SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

vs.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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1 In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ERICH HEISE, OSWALD ULBRICHT, HANS NIEMAN, INGWARD RUDLOFF, BODO HABENICHT, HANS DETHLEFFS, HEINZ PEERSCHKE, HANS MOSBERG, JOHANNES RATHJE, SIEGFRIED FUELLKRUG, WALTHER HEISSIG, JESCO VON PUTTKAMER, ALFRED ROMAIN, WALTER RICHTER, HERMAN JAEGER, FELIX ALTENBURG, HERBERT MUELLER, AUGUST STOCK, MARIA MULLER, APPELLANTS

v.

JAMES A. FORRESTAL, SECRETARY OF DEFENSE OF THE UNITED STATES; KENNETH C. ROYALL, SECRETARY OF THE ARMY OF THE UNITED STATES; OMAR BRADLEY, CHIEF OF STAFF OF THE UNITED STATES ARMY, MEMBER OF JOINT CHIEFS OF STAFF; WILLIAM D. LEAHY, MEMBER OF JOINT CHIEFS OF STAFF (CHIEF OF STAFF TO THE COMMANDER IN CHIEF OF THE UNITED STATES); LOUIS E. DENFELD, MEMBER OF JOINT CHIEFS OF STAFF (CHIEF OF NAVAL OPERATIONS); HOYT S. VANDENBERG, MEMBER OF JOINT CHIEFS OF STAFF (COMMANDING GENERAL OF THE UNITED STATES ARMY AIR FORCES), APPELLEES

Appeal from an Order of the District Court of the United States for the District of Columbia

Joint Appendix

Filed Dec. 20, 1948

2 In the United States District Court, District of Columbia

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ERICH HEISE, OSWALD ULBRICHT, HANS NIEMAN, INGWARD RUDLOFF, BODO HABENICHT, HANS DETHLEFFS, HEINZ PEERSCHKE, HANS MOSBERG, JOHANNES RATHJE, SIEGFRIED FUELLKRUG, WALTHER HEISSIG, JESCO VON PUTTKAMER, ALFRED ROMAIN, WALTER RICHTER, HERMAN JAEGER, FELIX ALTENBURG, HERBERT MUELLER, AUGUST STOCK, MARIA MULLER, PETITIONER

v.

JAMES A. FORRESTAL, SECRETARY OF DEFENSE OF THE UNITED STATES; KENNETH C. ROYALL, SECRETARY OF THE ARMY OF THE UNITED STATES; OMAR BRADLEY, CHIEF OF STAFF OF THE UNITED STATES ARMY, RESPONDENTS

Petition for Writ of Habeas Corpus

Filed April 26, 1948

Comes now your petitioner and to this Honorable Court respectfully represents:

I. That Petitioner, Ludwig Ehrhardt, brings this matter in his own behalf and as next friend of Franz Siebert, Erich Heise, Oswald Ulbricht, Hans Nieman, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Heinz Peerschke, Hans Mosberg, Johannes Rathje, Siegfried Euellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, and Maria Muller., The petitioner, together with the afore-mentioned other persons, hereinafter referred to as the prisoners, are confined in the custody of the Commandant of Landsberg prison, which is located in the American occupation zone of Germany.

3 II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

III. That the prisoners were, prior to May 8, 1945, German nationals in the service of the German armed forces in Shanghai, Canton, and Peiping, in China.

IV. That on May 8, 1945, a so-called "Act of Military Surrender" was executed by "Friedeburg", "Keitel", and "Stumpff", purporting to act on behalf of the German High Command, setting forth an "unconditional surrender" to the Supreme Commander, Allied Expeditionary Force and to the Supreme High Command of the Red Army of "all forces on land, at sea, and in the air" who were at that date "under German control". Paragraph four of the said Act provided: "This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole." (The "Act of Military Surrender" is marked "Exhibit A", attached hereto and made a part hereof.)

On June 5, 1945, there was executed by Dwight D. Eisenhower, G. Zhukov, B. L. Montgomery, and S. de Lattre-Tassigny, at

Berlin, the so-called "Berlin Declaration", which recited that the German armed forces had been defeated and had surrendered unconditionally, and had become subject to such requirements as were therein imposed; that there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the Victorious Powers," and which then set forth the terms of the Allied Military Occupation of Germany. (The "Berlin Declaration" is marked "Exhibit B", attached hereto and made a part hereof.) Neither the German High Command nor any other German agency was signatory to nor participant in the "Berlin Declaration", and it was entirely a unilateral pronouncement.

4

After May 8, 1945, and after June 5, 1945, and until and including August 15, 1945, the Japanese Empire continued to wage war against the United States.

V. That the cities of Shanghai, Canton, and Peiping were, prior to May 8, 1945, and thereafter until August 15, 1945, under the control and domination of the military forces of the Japanese Empire; that during the period of such control and domination, and until August 15, 1945, the prisoners were resident in the said cities and were subject to the said control and domination of the military forces of the Japanese Empire.

VI. That subsequent to August 15, 1945, twenty-seven persons, including the prisoners and, in addition, Ernest Woerman, Wilhelm Stoller, Elgar von Randow, Herbert Gleitsch, Johannes Otto, and Wolf Schenke (which latter six persons were later acquitted) were taken into custody and held by the Armed Forces of the United States. Twenty-three of the aforesaid persons were served on August 1, 1946, with a charge and bill of particulars, and the remaining four of the said persons were served, on August 28, 1946, with a similar charge and bill of particulars, all under the authority of the Commanding General, Nanking Headquarters Command, a division of United States Forces, China Theater. The charge and bill of particulars (a copy of which marked "Exhibit C" is hereto attached and made a part hereof) alleged violation of the laws of war, to wit: that the accused violated the unconditional German surrender by engaging in, permitting, or ordering military activity against the United States between the German surrender of May 8, 1945, and the cessation of Japanese hostilities on August 15, 1945.

5

VII. That by paragraph 1, Special Orders No. 120, Headquarters Nanking Headquarters Command dated July 31, 1946 (marked "Exhibit D" hereto attached and made a part hereof), a Military Commission was purported to be constituted for the trial of persons, units, and organizations accused as war criminals

within the jurisdiction of the said Nanking Headquarters Command, and upon the completion of such trial or trials to transmit the record thereof, including any judgment or sentence, for action by the appointing authority, viz: the Commanding General of the Nanking Headquarters Command. By letters of transmittal dated July 31, 1946, and August 1, 15, and 28, 1946, and by first indorsement on each hereof, the aforesaid charges against the 27 accused were referred to be tried in a common trial before the Military Commission (the said documents being marked "Exhibit E", attached hereto and made a part hereof). The aforesaid orders purported to be based on the authority of Letter, Headquarters, United States Forces, China Theater, 21 January 1946, AG000.5 (21 Jan 46) JA, Subject: Regulations Governing the Trial of War Criminals (marked "Exhibit F", attached hereto and made a part hereof).

VIII. That the common trial of the 27 accused began with the arraignment of 23 defendants before the aforesaid Military Commission sitting in courtroom, the Ward Road Jail, Shanghai, China, on August 26, 1946, and the arraignment of the 4 additional accused before the same Military Commission sitting in the same place on September 26, 1946. All of the accused pleaded "not guilty".

IX. That on September 16 and 17, 1946, the Military Commission convened and motions were made on behalf of all of the accused to dismiss the charges on the following grounds (inter alia):

1. That at the time of the German surrender, the accused were not under the control of the German High Command or the German Government, but were under the control of the armed forces of the Japanese Empire.

2. That the unconditional surrender of Germany did not bind the Japanese Empire so as to affect its right to compel cooperation of inhabitants of territory occupied by it,

3. That the acts charged did not constitute war crimes, there being no allegation that the accused had official knowledge or instructions concerning the German surrender;

4. That in the absence of hostilities, martial law, or American Military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China dated May 18, 1921, the Military Commission was without jurisdiction; all of which motions were denied.

X. That the hearing of the prosecution's case commenced on October 3, 1946, and ended on November 1, 1946, after which all accused moved for findings of not guilty. The motions were allowed with respect to the following six persons:

Ernst Woermann, German Ambassador to Japanese-occupied China,

Wilhelm Stoller, Chief of the Shanghai Office of the German Embassy,

Elgar von Randow, Counselor of the Shanghai Office of the German Embassy,

Herbert Gleitsch, Secretary of the German Consulate at Canton,

Johannes Otto, head of the Nazi Party in South China and leader of the German Community in South China,

Wolf Schenke, member, agent and employee of the Bureau Ehrhardt.

The motions were denied with respect to the remaining twenty-one accused, who are the prisoners for whom this petition is brought.

7 XI. That the hearing of the defense case commenced on November 13, 1946, and ended on January 14, 1947. On January 17, 1947, the Military Commission rendered its verdict, finding all remaining accused guilty, and sentencing them to confinement at hard labor, as follows:

Ludwig Ehrhardt	Life.
Ingward Rudloff	10 years.
Bodo Habenicht	10 years.
Hans Dethleffs	10 years.
Heinz Peerschke	5 years.
Hans Mosberg	20 years.
Johannes Rathje	15 years.
Walter Richter	10 years.
Hermann Jaeger	10 years.
Jesco von Puttkamer	30 years.
Alfred Romain	30 years.
Franz Siebert	5 years.
Erich Heise	20 years.
Oswald Ulbricht	5 years.
Hans Niemann	5 years.
Felix Altenburg	8 years.
Herbert Mueller	10 years.
Siegfried Fuellkrug	20 years.
Walther Heissig	20 years.
August Stock	5 years.
Maria Muller	5 years.

(The Commission's verdict marked "Exhibit G" is attached hereto and made a part hereof.)

XII. That at no time during any of the aforesaid proceedings was the protecting power of Germany notified thereof by the United States, although such notice is required by Article 60 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, and of Paragraph 133 of the Rules of Land Warfare (FM 27-10), United States War Department, copy of which is marked "Exhibit H" attached hereto and made a part hereof.

8 XIII. That on May 10, 1947, Major General John P. Lucas, Chief of the United States Army Advisory Group, China, which was the successor, pursuant to War Department radio WCL34266, dated December 5, 1946, of the Nanking Headquarters Command, acting as Reviewing Authority of the Military Commission, issued his action. The action approved all of the sentences of the Military Commission, but made the following remissions:

Alfred Romain—remitted from 30 years to 20 years.
August Stock—remitted from 5 years to 2 years.
Maria Muller—remitted from 5 years to 2 years.

With such modifications, the sentences were ordered executed, Landsberg Prison, Landsberg, Germany, being designated as the place of confinement. (The action of the Reviewing Authority is marked "Exhibit I", attached hereto and made a part hereof.)

XIV. That pursuant to such action, the prisoners were confined and are now confined in Landsberg Prison, Germany, in the custody of the United States Army.

XV. That the detention of the prisoners as convicted war criminals is illegal and in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States and of certain provisions of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, in that:

(a) There being no charge of an offense against the laws of war by the prisoners, the Military Commission was without jurisdiction.

(b) In the absence of hostilities, marital law, or American military occupation of China, and in view of treaties between the United States and China dated February 4, 1943, and May 4, 1943, and between Germany and China, dated May 18, 1921, the Military Commission was without jurisdiction.

9 (c) The directive of Headquarters, United States Forces, China Theater, (Exhibit F), setting forth the rules of procedure and evidence for the Military Commission, and the action of the Commission thereunder, denied the prisoners the right guaranteed by Article 63 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, to a trial, "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power," and the Military Commission was, therefore, without jurisdiction.

(d) The United States not having given notice of the trial to the protecting power of Germany as made mandatory by the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, the Military Commission had no jurisdiction.

XVI. That the prisoners are and continue to be unlawfully confined as convicted war criminals as aforesaid, by the respondents, their agents and subordinates.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be issued by this Court, directed to the respondents, commanding them to produce his body and the bodies of the other prisoners before your court or some member thereof at a time and place therein to be specified, then and there to receive and do what your Honorable Court shall order concerning their confinement as convicted war criminals, and that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT.

In United States District Court

Order to Show Cause

Filed May 17, 1948

Upon the complaint filed herein in the office of the clerk of this Court and the annexed affidavit of Lothar Eisentrager, alias Ludwig Ehrhardt, verified on the 12th day of April 1948,

Let the defendants, and each of them, show cause before this Court, at a stated term thereof, to be held for the hearing of motions, in the U. S. District Court, in the City of Washington, D. C., on the 10th day of June 1948, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above-entitled action which shall direct that a Writ of Habeas Corpus be issued as requested by the plaintiffs.

Let service of this rule nisi, together with a copy of the complaint and the affidavit hereto annexed, on such of the defendants as may be found within this district on or before the 1st day of June 1948, be deemed sufficient.

(S) T. ALAN GOLDSBOROUGH, *Justice.*

In United States District Court

Amendment of Petition for Writ of Habeas Corpus

Filed June 10, 1948

Comes now the petitioner, through his attorneys, and respectfully shows to this Honorable Court that the petition herein is amended as follows:

1. Paragraph III of the original petition is deleted and the following paragraph is substituted therefor:

III. That the prisoners were, prior to May 8, 1945, German nationals employed by various civilian agencies of the German Government in Shanghai, Canton, and Peiping, in China, as follows:

German Embassy and Consular Service.
Franz Siebert—Consul General at Canton.
Felix Altenburg—Chief, Peiping office, German Embassy.
German Information Bureau (an agency of the German Embassy).
Jesco von Puttkamer.
Alfred Romain.
Bureau Ehrhardt (an agency of the German Embassy).
Lothar Eisentrager, alias Ludwig Ehrhardt.
Erich Heise.
Oswald Ulbricht.
Hans Nieman.
Ingward Rudloff.
Bodo Habenicht.
Hans Dethleffs.
Heinz Peerschke.
Hans Mosberg.
Johannes Rathje.
Siegfried Fuellkrug.
Walther Heissig.
Walter Richter.
Hermann Jaeger.
August Stock.
Maria Muller.
Deutsches Nachrichtenburo (also known as DNB, the German News Agency).
Herbert Mueller.

2. Paragraph XV of the petition is amended by adding thereto a new subparagraph (e), following subparagraph (d), reading as follows:

(e) The prisoners at no time having been members of the armed forces of a nation at war with the United States but having been at all times civilian employees of civilian governmental agencies, they were not belligerents and the Military Commission was accordingly without jurisdiction to try them.

12 In United States District Court.

Return to Rule to Show Cause Why Writ of Habeas Corpus Should Not Issue

Filed June 10, 1948

Appear now the respondents herein by their attorney, George Morris Fay, United States Attorney, and for return to the rule to show cause heretofore issued in this cause, admit, deny, and allege as follows:

I. This paragraph of the petition is admitted.

II. Answering paragraph II of the petition, respondents admit they occupy the offices alleged of them, admit that the Commandant of Landsberg Prison is not within the territorial limits of the United States, and deny the remaining allegations thereof.

Further answering, respondents say that they have not, nor has any one of them the custody or keeping of the petitioners.

The respondents say further that the Commandant of Landsberg Prison derives his power and authority from the Commanding General, United States Forces, European Theatre, now redesignated Commanding General, European Command (G. O. USFET No. 48, 10 March 1947) in accordance with letter order A. G. 013.37 GAP—AGO A. P. O. 757, 11 July 1946, which established Landsberg Prison as the "war criminal prison" and makes the Commanding General, Third United States Army, responsible for the operation of that prison and further allege that said Commandant is subject to the direction and supervision of the Commanding General, Third United States Army, and the Commander-in-Chief, European Command and not to that of respondents. A copy of the order establishing Landsberg Prison as the place of imprisonment for war criminals is attached hereto as respondents' Exhibit No. One.

III. Admitted.

IV. Admitted.

V. Answering paragraph V of the petition, admit all thereof except that respondents deny that petitioners were
13 dominated or controlled by the military forces of the Japanese insofar as those acts with which they were charged in the charge and Bill of Particulars (Petitioners' Exhibit C) are concerned.

VI. Admitted.

VII. Admitted.

Further showing to the Court the authority of the said military commission to try petitioners upon the charges specified, respondents show the Court that on December 27, 1945, a directive was issued concerning the apprehension, trial and punishment of war

criminals in the India, Burma, and China Theatres. By this directive, a copy of which is attached hereto and marked Respondents' Exhibit Two, the Commanding General, United States Forces, China Theatre, was advised that he should report to the Joint Chiefs of Staff on war criminals who should be prosecuted by a United States Tribunal.

The said Commanding General did on April 19, 1946, report to the War Department by radio message on the case of the petitioners herein. A copy of this report is attached hereto and marked Respondents' Exhibit Three. This message requested authority of the Joint Chiefs of Staff to try by United States Military Commission in China, these petitioners for their continuing in organized intelligence espionage in China in violation of the terms of the German surrender (Petitioners' Exhibit A).

By radio message (Respondents' Exhibit Four, attached hereto), the Joint Chiefs of Staff on July 6, 1946, granted the authority requested to the Commanding General, United States Army Forces, China Theatre. This authority authorized him to appoint the Commission, approve sentences and designate Germany as the place of confinement.

By reason of subsequent changes in the designation of the United States Military Command in China, specific delegations of the authority originally granted to the Commanding General, United States Forces, China Theatre, were made as follows: (1) on July 9, 1946, to the Commanding General, Nanking, Headquarters
14 Command, as shown by Respondents' Exhibit Five, attached hereto, and (2) on December 3, 1946, to the Commanding General, United States Army Advisory Group, Nanking, China, as shown by Respondents' Exhibit Six, attached hereto.

VIII. Admitted.

IX. Admitted.

X. Admitted.

XI. Admitted.

XII. Answering paragraph XII of the petition, respondents admit no notice of proceedings given to a protecting power, and deny that Article 60 of the Geneva Convention or Paragraph 133 of the Rules of Land Warfare, United States War Department (FM 27-10) (Petitioners' Exhibit H) is applicable to the charges and proceedings had against petitioners as stated in the petition and this return.

XIII. Answering paragraph XIII of the petition, respondents admit that the sentences of the Military Commission were reviewed and approved, with modifications, and ordered into execution at Landsberg Prison, Landsberg, Germany, as stated in the petition. Respondents submit to the Court as Exhibit Seven, a copy of the

review of the proceedings prepared by the Staff Judge Advocate upon which the review and approval was based.

XIV. Admitted.

XV. Denied.

XVI. Denied.

Respondents inform the Court on information and belief that petitioners have presented to and are maintaining a petition for writ of habeas corpus before the United States Military Government Court, Munich, Germany. As to this proceeding, respondents pray that petitioners be required to fully inform the Court, that it may properly exercise its discretion.

Wherefore, respondents pray that the rule be discharged and the petition dismissed.

15 In United States District Court

Petitioner's Answer to Return to Rule to Show Cause

Filed June 21, 1948

Appears now the petitioner herein by his attorneys, and for his answer to the return to the rule to show cause, respectfully shows as follows:

I. Denies the allegation in Paragraph II of the return that respondents do not have the custody or keeping of the petitioners.

The petitioner says further that the Commanding General, European Command (formerly known as Commanding General, United States Forces, European Theatre), the Commanding General, Third United States Army, and the Commandant of Landsberg Prison, and each of them, derive their power and authority from and are subject to the direction and supervision of the respondents.

II. Answering Paragraph VII of the return, petitioner denies that the Supreme High Command of the Red Army participated in or consented to the trial of the prisoners, as was made mandatory by the German surrender terms (Resp. Exh. 3); and denies that the Chinese Government acquiesced in the trial, as was made mandatory by the radio messages from the Joint Chiefs of Staff to the Commanding General, U. S. Army Forces, China and to the Commanding Officer, Nanking Headquarters Command (Resp. Exhs. 4 and 5).

III. Answering Paragraph XVI of the return, the attorney for the petitioner herein states that he has no knowledge or information respecting a petition for writ of habeas corpus allegedly presented to and being maintained before the United States Military Government Court, Munich, Germany.

Wherefore, petitioner prays that the Writ of Habeas Corpus prayed for be issued and that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid.

* * * * *

16 In United States District Court

Motion for Amendment of Petition for Writ of Habeas Corpus

Filed July 15, 1948

Comes now the petitioner, through his attorneys, and respectfully moves this Honorable Court that the petition herein as amended, be further amended to add the Joint Chiefs of Staff of the United States as parties respondent, by deleting Paragraph II of the original petition, and substituting therefore the following paragraph:

II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; that the following four persons comprise the Joint Chiefs of Staff of the United States, and as such are joined as respondents: Fleet Admiral William D. Leahy (Chief of Staff to the Commander in Chief of the United States Army and Navy), Admiral Louis E. Denfeld (Chief of Naval Operations), General Omar Bradley (Chief of Staff of the United States Army), and General Hoyt S. Vandenberg (Commanding General of the United States Army Air Forces);—and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

* * * * *

17 In United States District Court

Order Allowing Amendment of Petition for Writ of Habeas Corpus

Filed Aug. 4, 1948

This cause came on to be heard at this term upon the motion of the petitioner herein for leave to amend his petition for writ of Habeas Corpus and was consented to by counsel for the re-

spondents; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that petitioner be permitted to amend his petition as prayed for in said motion by deleting paragraph 2 of the original petition and substituting therefor the following paragraph:

II. That the respondent, James A. Forrestal, is the Secretary of Defense of the United States; the respondent, Kenneth C. Royall, is the Secretary of the Army of the United States; and the respondent, General Omar Bradley, is the Chief of Staff of the United States Army; that the following four persons comprise the Joint Chiefs of Staff of the United States, and as such are joined as respondents: Fleet Admiral William D. Leahy (Chief of Staff to the Commander in Chief of the United States Army and Navy), Admiral Louis E. Denfeld (Chief of Naval Operations), General Omar Bradley (Chief of Staff of the United States Army), and General Hoyt S. Vandenberg (Commanding General of the United States Army Air Forces); and as such the said respondents have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison. The said Commandant of Landsberg Prison is not made a respondent hereto because he is not situated within and cannot be served with process within the territorial limits of the United States. He derives his powers and authority from and is subject to the direction of the respondents, all of whom are located within the District of Columbia.

EDWARD M. CURRAN,
District Judge.

Dated this 4th day of August 1948.

* * * * * *

18 In United States District Court

Order to Show Cause

Upon the Order issued by the Court granting Plaintiff's motion to amend the complaint filed herein,

Let the defendants, and each of them Omar Bradley, William D. Leahy, Louis E. Denfeld, and Hoyt S. Vandenberg, as Joint Chiefs of Staff, show cause before this Court at a stated term thereof, to be held for the hearing of Motions, in the U. S. District Court, in the City of Washington, D. C., on the 21st day of September, 1948, at 10 o'clock in the morning of said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above entitled action which shall direct that a Writ of Habeas Corpus be issued as requested by the plaintiffs.

Let service of this rule nisi, together with a copy of the complaint on such of the defendants as may be found within this district on or before the 10th day of September, 1948, and answer of the defendants filed on or before the 20th day of September, 1948, be deemed sufficient.

August 23, 1949.

R. B. KEECH, *District Judge.*

* * * * *

In United States District Court

Motion for Leave to Amend Return to Rule to Show Cause

Filed Aug. 31, 1948

Come now the respondents, James A. Forrestal, Kenneth C. Royall and Omar Bradley, by their attorney, George Morris Fay, United States Attorney, and move the Court as follows:

(1) To allow said respondents to amend the return made on their behalf to the rule to show cause, by adding to paragraph 7 at the end thereof, a new clause reading as follows: "By a communication dated November 26, 1946, from the Chinese Minister for Foreign Affairs, Dr. Wang Shihchieh, to the American
19 Ambassador, Dr. J. Leighton Stuart, the Chinese Government acquiesced in the prosecution of war criminals by American military tribunals within the territory of China, as shown by respondents' Exhibit No. 7, attached hereto."

(2) To allow the said respondents to supply a copy of respondents' Exhibit No. 7 as part of the amendment to the return to the rule to show cause.

* * * * *

In United States District Court

Order Granting Motion for Leave to Amend Return

Filed Aug. 31, 1948

Upon consideration of the respondents' motion for leave to file an amendment to their return to the rule to show cause by adding a paragraph to paragraph 7 of said return, and for leave to file an additional exhibit, respondents' Exhibit No. 7, of said amendment, it is by the Court this 31st day of August 1948.

Ordered, that said motion be and is hereby granted.

R. B. KEECH, *Justice.*

* * * * *

In United States District Court

Return to Rule to Show Cause Why Writ of Habeas Corpus Should Not Issue

Filed Sept. 20, 1948

Appear now the respondents herein, by their attorney, George Morris Fay, United States Attorney, and for return to rule to show cause issued on August 23, 1948, in this cause, hereby adopt as their return to the said writ their return hereinbefore filed on June 10, 1948, to a rule to show cause hereinbefore issued on June 1, 1948, except as follows:

Strike answer to paragraph III and substitute the following:

III. Answering amended paragraph III of the petition, respondents deny that petitioners were in the employ of various civilian agencies of the German Government, and aver that they were in the service of the German armed forces as alleged in the original petition filed herein.

Wherefore, respondents pray that the rule be discharged and the petition dismissed.

* * * * *

In United States District Court

Motion for Amendment of Petition for Writ of Habeas Corpus

Filed Sept. 30, 1948

Comes now the petitioner, through his attorneys, and respectfully moves this Honorable Court that the petition herein be further amended as follows:

1. By adding to Paragraph XI of the Petition, at the end thereof, the sentence: "The record of the proceedings before the Military Commission marked 'Exhibit J' is attached hereto and and made a part hereof."

2. By adding to the Petition as "Exhibit J" the record of the proceedings before the Military Commission.

* * * * *

In United States District Court

Order Allowing Amendment of Petition for Writ of Habeas Corpus

Filed Sept. 30, 1948

Upon consideration of the petitioner's motion for leave to file an amendment to his Petition for Writ of Habeas Corpus by add-

ing a sentence to Paragraph XI of the Petition at the end thereof, and by adding an additional exhibit, "Exhibit J," it is by the Court this 30th day of September 1948,

Ordered, that said motion be and is hereby granted.

EDWARD A. TAMM.

* * * * *

21 In United States District Court

Order dismissing petition

Filed Sept. 30, 1948

Upon consideration of the rule to show cause why a writ of habeas corpus should not issue, hereinbefore issued in this case, and the return to the rule, and upon consideration of the argument by counsel herein, and it appearing to the Court that it is without jurisdiction to issue a writ of habeas corpus, the petitioners not being within the jurisdiction of the Court, it is by the Court, this 30th day of September 1948.

Ordered, that the petition for habeas corpus be and the same is hereby dismissed.

EDWARD A. TAMM, *Judge.*

* * * * *

In United States District Court

Opinion

Filed Oct. 6, 1948

TUESDAY, *September 28, 1948.*

Counsel having been heard on the question of jurisdiction, the opinion of the Court was stated as follows:

The Court (Tamm, J.). This case is before the Court on the petition of a number of war prisoners, who admittedly are not now and have never been in the United States. It is a petition naming the heads of the Department of National Defense as defendants and asks that the plaintiff be permitted the process of habeas corpus. The habeas corpus process is authorized to the District Court through the provisions of sections 451 and 452 of the Judicial Code, which provide:

"Power of Courts: The Supreme Court and the District Courts shall have power to issue writs of habeas corpus.

22 "Power of Judges: The several justices of the Supreme Court and the several judges of the circuit courts of appeal and the district courts within their respective jurisdictions shall

have power to grant writs of habeas corpus for the purpose of an inquiry into the causes of restraints of liberty."

The facts at issue were directly raised before the Supreme Court in its last term, in the case of Paul Ahrens et al. v. Tom C. Clark, Attorney General of the United States, 16 Law Week 4640, in which the Supreme Court specifically passed upon the power of the district courts to issue writs of habeas corpus in cases in which the petitioners are not physically within the jurisdiction of the court. In that case Justice Douglas, in delivering the majority opinion of the Supreme Court, stated:

"The question at the threshold of the case is whether the words 'within their respective jurisdictions' limited the district courts to inquiries into the causes of restraints of liberties of those confined or restrained within the territorial jurisdictions of the courts."

"That is our view," says Justice Douglas in expressing the majority opinion of the Supreme Court.

It appearing, consequently, that the Supreme Court has specifically passed upon the question of law presented to this Court, the Court bows to that decision and the petition is dismissed.

In United States District Court

Notice of Appeal

Filed Oct. 6, 1948

Notice is hereby given that the petitioners above named hereby appeal to the Circuit Court of Appeals for the District of Columbia from the order of Judge Edward A. Tamm in the United States District Court for the District of Columbia, dismissing the petition for writ of habeas corpus on the ground of lack of jurisdiction of the United States District Court for the District of Columbia entered in this action on September 28, 1948.

23

WALLACE M. COHEN,
1822 Jefferson Place NW., Washington, D. C.
A. FRANK REEL,
20 Pemberton Square, Boston, Massachusetts,
Attorneys for Petitioners.

24 In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

[Title omitted.]

Joint Appendix of Exhibits

Filed Feb. 3, 1949

25-26 *Exhibit "A"—Act of Military Surrender*

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force and by the Supreme High Command of the Red Army.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with
with this Act of Surrender, the Supreme Commander, Al-
27 lied Expeditionary Force and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate.

6. This Act is drawn up in the English, Russian and German languages. The English and Russian are the only authentic texts.

Signed at Berlin on the 8 day of May 1945.

(S) FRIEDBURG.
(S) KEITEL.
(S) STUMPFF.
/t/ On behalf of the German High Command.

In the Presence of:

(S) A. W. TEDDER,
On behalf of the Supreme Commander, Allied Expeditionary Force.
(S) G. ZHUKOV,
On behalf of the Supreme High Command of the Red Army.

At the signing also were present as witnesses:

(S) S. DE LATTRE-TASSIGNY,
/t/ General Commanding in Chief First French Army.
(S) CARL SPAATZ,
/t/ General, Commanding United States Strategic Air Forces.

28 *Exhibit "B"—Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic*

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the

United Kingdom and the French Republic, hereinafter called the "Allied Representatives," acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and
29 the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers, does not effect the annexation of Germany.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply:

ARTICLE 1

Germany, and all German military, naval and air authorities and all forces under German control shall immediately cease hostilities in all theatres of war against the forces of the United Nations on land, at sea and in the air.

ARTICLE 2

(a) All armed forces of Germany or under German control, wherever they may be situated, including land, air, anti-aircraft and naval forces, the S. S., S. A. and Gestapo, and all other forces or auxiliary organizations equipped with weapons, shall be completely disarmed, handing over their weapons and equipment to local Allied Commanders or to officers designated by the Allied Representatives.

(b) The personnel of the formations and units of all the forces referred to in paragraph (a) above shall, at the discretion of the Commander-in-Chief of the Armed Forces of the Allied State concerned, be declared to be prisoners of war, pending fur-
30 ther decisions, and shall be subject to such conditions and directions as may be prescribed by the respective Allied Representatives.

(c) All forces referred to in paragraph (a) above, wherever they may be, will remain in their present positions pending instructions from the Allied Representatives.

(d) Evacuation by the said forces of all territories outside the frontiers of Germany as they existed on the 31st December 1937, will proceed according to instructions to be given by the Allied Representatives.

(e) Detachments of civil police to be armed with small arms only, for the maintenance of order and for guard duties, will be designated by the Allied Representatives.

ARTICLE 3

(a) All aircraft of any kind or nationality in Germany or German-occupied or controlled territories or waters, military, naval or civil, other than aircraft in the service of the Allies, will remain on the ground, on the water or aboard ships pending further instructions.

(b) All German or German-controlled aircraft in or over territories or waters not occupied or controlled by Germany will proceed to Germany or to such other place or places as may be specified by the Allied Representatives.

ARTICLE 4

(a) All German or German-controlled naval vessels, surface and submarine, auxiliary naval craft, and merchant and other shipping, wherever such vessels may be at the time of this Declaration, and all other merchant ships of whatever nationality in German ports, will remain in or proceed immediately to ports and bases as specified by the Allied Representatives. The crews of such vessels will remain on board pending further instructions.

(b) All ships and vessels of the United Nations, whether or not title has been transferred as the result of prize court or other proceedings, which are at the disposal of Germany or under
31 German control at the time of this Declaration, will proceed at the dates and to the ports or bases specified by the Allied Representatives.

ARTICLE 5

(a) All or any of the following articles in the possession of the German armed forces or under German control or at German disposal will be held intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe—

(i) all arms, ammunition, explosives, military equipment, stores and supplies and other implements of war of all kinds and all other war material:

(ii) all naval vessels of all classes, both surface and submarine, auxiliary naval craft and all merchant shipping, whether afloat, under repair or construction, built or building;

(iii) all aircraft of all kinds, aviation and antiaircraft equipment and devices;

(iv) all transportation and communications facilities and equipment by land, water or air;

(v) all military installations and establishments, including airfields, seaplane bases, ports and naval bases, storage depots, permanent and temporary land and coast fortifications, fortresses and other fortified areas, together with plans and drawings of all such fortifications, installations and establishments;

(vi) all factories, plants, shops, research institutions, laboratories, testing stations, technical data, patents, plans, drawings and inventions, designed or intended to produce or to facilitate the production or use of the articles, materials and facilities referred to in subparagraphs (i), (ii), (iii), (iv) and (v) above or otherwise to further the conduct of war.

(b) At the demand of the Allied Representatives the following will be furnished:

(i) the labour, services and plant required for the maintenance or operation of any of the six categories mentioned in paragraph (a) above; and

32 (ii) any information or records that may be required by the Allied Representatives in connection with the same.

(c) At the demand of the Allied Representatives all facilities will be provided for the movement of Allied troops and agencies, their equipment and supplies, on the railways, roads and other land communications or by sea, river or air. All means of transportation will be maintained in good order and repair, and the labour, services and plant necessary therefor will be furnished.

ARTICLE 6

(a) The German authorities will release to the Allied Representatives, in accordance with the procedure to be laid down by them, all prisoners of war at present in their power belonging to the forces of the United Nations, and will furnish full lists of these persons, indicating the places of their detention in Germany or territory occupied by Germany. Pending the release of such prisoners of war, the German authorities and people will protect them in their persons and property and provide them with adequate food, clothing, shelter, medical attention and money in accordance with their rank or official position.

(b) The German authorities and people will in like manner provide for and release all other nationals of the United Nations who are confined, interned or otherwise under restraint, and all

other persons who may be confined, interned or otherwise under restraint for political reasons or as a result of any Nazi action, law or regulation which discriminates on the ground of race, colour, creed or political belief.

(c) The German authorities will, at the demand of the Allied Representatives, hand over control of places of detention to such officers as may be designated for the purpose by the Allied Representatives.

ARTICLE 7

The German authorities concerned will furnish to the Allied Representatives:

33 (a) full information regarding the forces referred to in Article 2 (a), and, in particular, will furnish forthwith all information which the Allied Representatives may require concerning the numbers, locations and dispositions of such forces, whether located inside or outside Germany;

(b) complete and detailed information concerning mines, minefields and other obstacles to movement by land, sea or air, and the safety lanes in connection therewith. All such safety lanes will be kept open and clearly marked; all mines, minefields and other dangerous obstacles will as far as possible be rendered safe, and all aids to navigation will be reinstated. Unarmed German military and civilian personnel with the necessary equipment will be made available and utilized for the above purposes and for the removal of mines, minefields and other obstacles as directed by the Allied Representatives.

ARTICLE 8

There shall be no destruction, removal, concealment, transfer, or scuttling of, or damage to, any military, naval, air, shipping, port, industrial and other like property and facilities and all records and archives, wherever they may be situated, except as may be directed by the Allied Representatives.

ARTICLE 9

Pending the institution of control by the Allied Representatives over all means of communication, all radio and telecommunication installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representatives.

ARTICLE 10

The forces, ships, aircraft, military equipment, and other property in Germany or in German control or service or at German

disposal, of any other country at war with any of the Allies,
34 will be subject to the provisions of this Declaration and of any proclamations, orders, ordinances or instructions issued thereunder.

ARTICLE 11

(a) The principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offenses, will be apprehended and surrendered to the Allied Representatives.

(b) The same will apply in the case of any national of any of the United Nations who is alleged to have committed an offence against his national law, and who may at any time be named or designated by rank, office or employment by the Allied Representatives.

(c) The German authorities and people will comply with any instructions given by the Allied Representatives for the apprehension and surrender of such persons.

ARTICLE 12

The Allied Representatives will station forces and civil agencies in any or all parts of Germany as they may determine.

ARTICLE 13

(a) In the exercise of the supreme authority with respect to Germany assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, the four Allied Governments will take such steps, including the complete disarmament and demilitarization of Germany, as they deem requisite for future peace and security.

(b) The Allied Representatives will impose on Germany additional political, administrative, economic, financial, military and
35 other requirements arising from the complete defeat of Germany. The Allied Representatives, or persons or agencies duly designated to act on their authority, will issue proclamations, orders, ordinances and instructions for the purpose of laying down such additional requirements, and of giving effect to the other provisions of this Declaration. All German authorities and the German people shall carry out unconditionally the requirements of the Allied Representatives, and shall fully comply with all such proclamations, orders, ordinances and instructions.

ARTICLE 14

This Declaration enters into force and effect at the date and hour set forth below. In the event of failure on the part of the German authorities or people promptly and completely to fulfill their obligations hereby or hereafter imposed, the Allied Representatives will take whatever action may be deemed by them to be appropriate under the circumstances.

ARTICLE 15

This Declaration is drawn up in the English, Russian, French and German languages. The English, Russian and French are the only authentic texts.

5 June 1945. Berlin. Hours—Central European Time.

The word "nationals" has been omitted pending check.

Signed by the Allied Representatives:

(S) DWIGHT D. EISENHOWER,
General of the Army, U. S. A.

(S) G. ZHUKOV,

(S) B. L. MONTGOMERY,
Field-Marshal,

(S) S. DE LATTRE-TASSIGNY,
Général d'Armie.

36 *Exhibit "C"—Charge*

That between 8 May and 15 August 1945, Lothar Eisentraeger alias Ludwig Ehrhardt, Franz Siebert, Herbert Glietsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hans Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Poerschke, Hans Mosberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, Maria Muller, individually and as officials, nationals, citizens, agents or employees of Germany, while residing in China at a time when the United States of America was at war with Japan, did in China in a Theatre of military operations, knowingly, wilfully and unlawfully violate the unconditional German surrender by engaging in and continuing military activity against the United States and its allies, to wit, by furnishing, ordering, authorizing, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and materials to the Japanese armed forces and agencies thereof, by such acts of treachery assisting Japan in waging

war against United States of America, in violation of the laws and customs of war.

Bill of Particulars

1. That between 8 May and 15 August 1945, Lothar Eisentraeger, alias Ludwig Ehrhardt, a member of the German Embassy to enemy-occupied China, as head of a German intelligence agency known as the Bureau Ehrhardt, a unit of the German High Command, did individually at Shanghai and by his agents at Shanghai, Canton and Peiping, wilfully and unlawfully engage in military activity, against the United States and its allies, to wit, the collection of military intelligence concerning, inter
37 alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; that on or about 8 May 1945, as head of the Bureau Ehrhardt, he did wilfully and unlawfully transmit through the Shanghai Office of the German Embassy in China, a telegram ordering, authorizing and permitting his agents in Canton and Peiping to furnish aid and intelligence to the Japanese armed forces; that he did wilfully and unlawfully order, authorize and permit his agents in Shanghai to furnish aid and intelligence to the Japanese armed forces.

2. That between 8 May and 15 August 1945, Franz Siebert, in his position as German Consul General, former German Consul General and a leader of the German community at Canton, did at Canton wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning the United States and its allies and transmission of it to the Japanese armed forces, by persons under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others; and that he did wilfully and unlawfully order and instruct representatives of German business firms, on or about 15 May 1945 to submit to him lists of essential war materials in their possession which lists on or about 1 and 7 June 1945 were submitted by him to the Japanese armed forces enabling them to secure control and make use of said materials; and that he did on or about 15 May 1945 wilfully and unlawfully order all German citizens and nationals in the Canton area, at a called meeting, to obey his commands to continue active assistance to the Japanese authorities under penalty of punishment by the Japanese.

3. That between 8 May and 15 August 1945, Herbert Gletsch, in his position as Secretary and former Secretary of the German Consulate at Canton, as a leader of the German community there, and agent of the German High Command, did at Canton

38 wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies to wit, the collection of intelligence concerning inter alia, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces; by persons under his control, namely Erich Heise, Oswald Ulbricht and Hans Niemann; that he decoded, approved and delivered on or about 15 May 1945 to Erich Heise, Canton chief of the Bureau Ehrhardt, a German High Command intelligence agency, a telegram dated on or about 8 May 1945 which unlawfully ordered and authorized the continuation of military activity.

4. That between 8 May and 15 August 1945, Johannes Otto, in his position as head of the Nazi Party in South China and a leader of the German community there, did at Canton wilfully and unlawfully authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it to the Japanese armed forces by persons of the community under his control, namely Erich Heise, Oswald Ulbricht, Hans Niemann and others.

5. That between 8 May and 15 August 1945, Erich Heise, member and agent of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Canton office, known as the Office Heise, did at Canton wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and transmission of it and information and advice to the Japanese armed forces; and that he did wilfully and
39 unlawfully order and permit persons under his control, namely Oswald Ulbricht, Hans Niemann and others to engage in the same unlawful activity.

6. That between 8 May and 15 August 1945, Oswald Ulbricht, member and agent of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Canton, known as the Office Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

7. That between 8 May and 15 August 1945, Hans Niemann, member and agent of the Bureau Ehrhardt, an intelligence agency

of the German High Command and employed in its office at Canton, known as the Office Heise, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements, by the United States and its allies and the rendering of other aid, assistance and advice to the Office Heise knowing it was for the use and benefit of and furnished to the Japanese armed forces.

8. That between 8 May and 15 August 1945, Ingward Rudloff, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

9. That between 8 May and 15 August 1945, Bodo Habenicht, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements, by the United States, and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

10. That between 8 May and 15 August, Hans Dethleffs, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance, and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

11. That between 8 May and 15 August 1945, Wolf Schenke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai, wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States

and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

12. That between 8 May and 15 August 1945, Heinz Peerschke, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

13. That between 8 May and 15 August 1945, Hans Mosberg, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces.

14. That between 8 May and 15 August 1945, Johannes Rathje, a member, agent and employee of the Bureau Ehr-
42 hardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea, and air movements by the United States and its allies and rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

15. That between 8 May and 15 August 1945, Siegfried Fuellkrug, a member, agent and employee of the Bureau Ehrhardt, an intelligence unit of the German High Command and head of its Peiping office, known as the Office Fuellkrug, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under

his control, to wit, August Stock, Walther Heissig and Maria Muller to engage in such unlawful activity.

16. That between 8 May and 15 August 1945, Walther Heissig, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command and employed in its office at Peiping, known as the Office Fuelkrug, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and compilation of military intelligence concerning, inter alia, land, sea and air movements by the United States and its
43 allies and transmission of it and information and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Bureau of Ehrhardt and the Japanese armed forces; and that he did order, permit and authorize persons under his control, to wit, August Stock and Maria Muller, to engage in similar unlawful activity.

17. That between 8 May and 15 August 1945, Jesco von Puttkamer, in his position as head of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did thereat individually and by his agents wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the Japanese armed forces for their use propaganda material in the English language consisting of, inter alia, leaflets, posters, and photographs designed to influence, adversely to the United States and its allies, the actions of United States troops and civilian populations; and that he did wilfully and unlawfully furnish military advice, information and intelligence to the Japanese armed forces.

18. That between 8 May and 15 August 1945, Alfred Romain, a member and employee of the German Information Bureau, Shanghai, a military propaganda agency of the German Embassy to enemy-occupied China, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, psychological warfare by designing, preparing and furnishing to the German Information Bureau and to the Japanese armed forces for use by the latter, propaganda material in the English language, consisting of inter alia, leaflets, posters, designs and photographs intended to influence, ad-
44 versely to the United States and its allies, the actions of United States troops and civilian populations.

19. That between 8 May and 15 August 1945, Ernst Woermann, in his position as German Ambassador to enemy-occupied China, former German Ambassador, head of the German community there and the superior of Lothar Eisentrager, alias Ludwig Ehr-

hardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda agency, did in China willfully and unlawfully order, authorize, permit and fail to stop German military activity against the United States and its allies, by those under his command and control, to wit, the collection and analysis by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces for their use.

20. That between 8 May and 15 August 1945, Wilhelm Stoller, in his position as chief of the Shanghai Office of the German Embassy to enemy-occupied China, and the superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in control of the German Information Bureau, a military propaganda Agency, as former chief of such Embassy Office and a head of the German community in Shanghai, did at Shanghai wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of propaganda material in Shanghai against the United States and its allies and transmission of both to the Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approval expressed in a telegram to the German Consulate at Canton and the Embassy Office at Peiping signed by him, dated on or about 8 May 1945 and duly delivered.

21. That between 8 May and 15 August 1945, Elgar von Randow, in his position as Counselor of the Shanghai Office of the German Embassy to enemy-occupied China and the immediate superior of Lothar Eisentrager, alias Ludwig Ehrhardt, diplomatic official and head of the Bureau Ehrhardt, a German High Command intelligence agency, and in immediate control of the German Information Bureau, a military propaganda agency, as former counselor of such office and a head of the German community in Shanghai, did at Shanghai, wilfully and unlawfully order, authorize, permit and fail to stop the continuation of German military activity against the United States and its allies, by those under his command and control, to wit, the collection by the Bureau Ehrhardt of intelligence in Shanghai, Canton and Peiping and preparation by the German Information Bureau of

propaganda material in Shanghai against the United States and its allies and transmission of both to Japanese armed forces; that unlawful activity of intelligence nature took place in Canton and Peiping pursuant to his direction and approved expressed in a telegram to the German Consulate at Canton and the Embassy Office at Peiping, approved and dispatched by him on or about 8 May 1945, and duly delivered.

22. That between 8 May and 15 August 1945, Walter Richter, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

46

23. That between 8 May and 15 August 1945, Herman Jaeger, a member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, did at Shanghai wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, compilation and transmission of military intelligence concerning, inter alia, land, sea and air movements of the United States and its allies and the rendering of other aid, assistance and advice to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

24. That between 8 May and 15 August 1945, Felix Altenburg, in his position as chief of the Peiping Office of the German Embassy to enemy-occupied China and the superior of Siegfried Fuellkrug who was a member of the Embassy staff and head of the Peiping unit of the German High Command's intelligence agency in China, namely the Bureau Ehrhardt, as former chief of such Embassy Office and a leader of the Germany community at Peiping, did at Peiping wilfully and unlawfully, order, authorize, permit and fail to stop the continuation by persons under his control, to wit, Siegfried Fuellkrug, Walther Heissig, Herbert Mueller, August Stock, Maria Muller and others, of military activity against the United States and its allies, to wit, the collection of intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and analysis of and advice on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics and other nations allied with the United States to the Japanese armed forces.

47

25. That between 8 May and 15 August 1945, Herbert Mueller, in his position as agent of the Peiping office of a German government news and propaganda agency, Deutsches Nachrichtenburo, also known as DNB, did at Peiping wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, interpretation, edition, analysis and transmission to the Japanese armed forces of economic, political and military inteligence, including that which he daily intercepted from radio broadcasts by the United States and its allies.

26. That between 8 May and 15 August 1945, August Stock, member, agent and employee of the Bureau Ehrhardt, an intelligence agency of the German High Command, and employed in its office at Peiping known as the Office Fuellkrug did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies, and transmission of it and information on political and military conditions, plans and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

5 Yrs. [Reduced to 2 Yrs.]

27. That between 8 May and 15 August 1945, Maria Muller, member agent and employee of the Bureau Ehrhardt, an in-
48 telligence agency of the German High Command and employed in its office at Peiping known as the Office Fuellkrug, did thereat wilfully and unlawfully engage in military activity against the United States and its allies, to wit, the collection, translation and analysis of military intelligence concerning, inter alia, land, sea and air movements by the United States and its allies and transmission of it and information on political and military conditions and happenings in North China, Mongolia and the Union of Soviet Socialist Republics to the Japanese armed forces and to the Bureau Ehrhardt, knowing it was for the use and benefit of and furnished to the Japanese armed forces.

Exhibit "F"

Restricted

HEADQUARTERS,
UNITED STATES FORCES, CHINA THEATER.

APO 971
AG 000.5 (21 Jan 46) JA *21 January 1946.*

Subject: Regulations Governing the Trial of War Criminals

The following rules and regulations will govern the trials of persons, units and organizations accused as War Criminals in this theater:

ESTABLISHMENT OF MILITARY COMMISSIONS

1. General. Trial of persons, units, and organizations accused as War Criminals will be by military commissions to be convened by the Commanding General, United States Army Forces, China Theater.

2. Number and Types. The number and types of commissions to be established will depend upon the number and nature of the offenses involved and of the offenders to be tried. Such
49 commissions may include members of any one branch or of several branches of the armed services, to try cases involving offenses against any one or more of such service branches, or any other offenses.

JURISDICTION

3. Over Territory. The military commissions established hereunder shall have jurisdiction over all of China, co-extensive with the China Theater of Operations, and territory now or formerly belonging to China, including Formosa, Manchuria, and Hainan Island, and other areas wherein the armed forces commanded by the Commanding General, United States Army Forces, China Theater, are or have been stationed.

4. Over Persons. a. The military commissions established hereunder shall have jurisdiction over all persons, units or organizations within China Theater of Operations including Formosa, Manchuria and Hainan Island and other areas wherein the armed forces, commanded by the Commanding General, United States Army Forces, China Theater are or have been stationed.

b. Any military or Naval unit or any official or un-official group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission.

c. The convening authority may specify particular offenders to be tried before any commission appointed by him.

5. Over Offenses. a. The military commissions established hereunder shall have jurisdiction over the following offenses: Violations of the laws or customs of war, including but not limited to murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purposes, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offense within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offenses against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.

b. Persons whose offenses have a particular geographical location outside the China Theater of Operations may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction. In the event a person is requested for trial in two (2) or more countries, the Commanding General, United States Army Forces, China Theater, will determine the place of trial on the basis of the relative gravity of the respective charges and other relevant circumstances.

MEMBERSHIP OF COMMISSION

6. Appointment. The members of each military commission will be appointed by the Commanding General, United States Army Forces, China Theater, or under authority delegated by him. The appointment may be made in the order convening the commission or in a separate order. Alternates may be appointed by the convening authority. Such alternates shall attend all sessions of the commission and in case of illness or other incapacity of any principal member, an alternate shall take the place of that member. Any vacancy among the members or alternates occurring after a trial has begun may be filled by the convening authority, but

51 the substance of all proceedings had and evidence taken in that case shall be made known to that new member or alternate in open court before the trial proceeds.

7. Number of Members. Each commission shall consist of not less than three (3) members.

8. Qualifications. The convening authority shall appoint to the commission persons whom he determines to be competent to perform the duties involved and not disqualified by personal interest or prejudices: provided, that no person shall be appointed to hear a case which he personally investigated, nor if he is required as a witness in that case. A commission may consist of Army and other service personnel, or of both service personnel and civilians. If feasible, one or more members of a commission should have had legal training.

9. Quorum and Voting. A quorum shall consist of two-thirds (⅔) of the members of the commission, or alternates (if any) acting as members, but in no event less than three (3) members. All decisions of the commission shall be by majority vote of the members present when the vote is taken, which shall be a quorum, except that conviction and sentence shall be by the affirmative votes of not less than two-thirds (⅔) of the members of the quorum. In case of a tie vote, the vote of the presiding member will determine.

10. Presiding Member. In the event the convening authority does not name one of the members as the presiding member the senior officer among the members of the commission present shall preside, or such other member as the senior officer may designate.

Prosecutors

11. Appointment. The convening authority shall designate one or more persons to conduct the prosecution before each commission.

52 12. Duties. The duties of the prosecutor are:

a. To determine the offenses and the offenders to be tried before the commission in addition to those specifically ordered by the convening authority.

b. To prepare and present to the commission charges and specifications.

c. To prepare cases for trial and to conduct the prosecution of each case before the commission.

Powers and Procedure of Commissions

13. Conduct of the Trial. A Commission shall:

a. Confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference.

b. Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor.

c. Sessions of a commission shall be public except when otherwise directed by the commission.

d. A commission shall hold each session at such time and place as it shall determine or as may be directed by the convening authority.

14. Rights of the Accused. The accused shall be entitled:

a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offense charged.

b. To be represented prior to and during trial by counsel of his own choice, or to conduct his own defense. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused.

c. To have his own counsel present relevant evidence at the trial in support of his defense, and cross-examine each adverse witness who personally appears before the commission.

d. To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them.

53 15. Witnesses. The commission shall have power:

a. To summon witnesses and require their attendance and testimony under penalty; to administer oaths or affirmation to witness and other persons, and to question witnesses.

b. To require the production of documents and other evidentiary material.

c. To have evidence taken by a special commissioner appointed by the commission.

16. Evidence. a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charges, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents.

(6) Hearsay evidence.

54 b. The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations.

c. A commission may require the prosecution and the defense to make a preliminary offer of proof, whereupon the commission may rule in advance on the admissibility of such evidence.

d. If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense.

e. The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

f. The official position of the accused shall not absolve him from responsibility, or be considered in mitigation or punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.

17. Trial Procedure. The proceedings at each trial will be conducted substantially as follows, unless modified by the commission to suit the particular circumstances:

55 a. Each charge and specification will be read, or its substance stated, in open court.

b. The presiding member shall ask each accused whether he pleads "Guilty" or "Not Guilty".

c. The prosecution shall make its opening statement.

d. The presiding member may, at this or any other time, require the prosecutor to state what evidence he proposes to submit to the

commission, and the commission thereupon may rule upon the admissibility of such evidence.

e. The commission may put any question to any witness and to any accused at any time. The prosecution and the defense may then further examine and/or cross-examine any such witness or accused.

f. The witnesses and other evidence for the prosecution shall be heard or presented. At the close of the case for the prosecution, the commission may, on motion of the defense for a finding of not guilty, consider and rule whether the evidence before the commission supports the charges against the accused. The commission may defer action on any such motion and permit or require the prosecution to reopen its case and produce any further available evidence.

g. The defense may make an opening statement prior to presenting its case. The presiding member may, at this or any other time, require the defense to state what evidence they propose to submit to the commission, whereupon the commission may rule upon the admissibility of such evidence.

h. The witnesses and other evidence for the defense shall be heard or presented. Thereafter, the prosecution and defense may introduce such evidence in rebuttal as the commission may rule admissible.

i. The defense, and thereafter the prosecution, shall address the commission.

j. The commission shall consider the case in closed session and thereafter in open court deliver its judgment, and in the event of a conviction shall pronounce sentence.

56 18. Record of Proceedings. Each commission shall make a separate record of its proceedings in the trial of each case brought before it. The record shall be prepared by the prosecutor under the direction of the commission and submitted to the defense counsel. The commission shall be responsible for its accuracy. Such record, certified by the presiding member of the commission or his successor, shall be delivered to the convening authority as soon as possible after the trial.

JUDGMENT AND SENTENCE

19. Judgment. The judgment of a commission as to guilt or acquittal shall be delivered in open court. It may state the reasons on which based.

20. Sentence. The commission may sentence an accused, upon conviction, to death by hanging or shooting, imprisonment for life or for any less term, fine, or such other punishment as the commission shall determine to be proper. The commission may

also order confiscation of any property of a convicted accused, deprive that accused of any stolen property, or order its delivery to the Commanding General, United States Army Forces, China Theater, for disposition as he shall find be proper, or may order restitution with appropriate penalty in cases of default.

21. Approval of Sentence. No sentence, including the death sentence, of a military commission shall be carried into effect until approved by the Commanding General, United States Army Forces, China Theater, or his successor. He shall have authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed, or (without prejudice to accused) remand the case for rehearing before a new military commission; but he shall not have authority to increase the severity of the sentence. Except as herein provided, the judgment and sentence and interlocutory rulings of a commission shall be final
57 and not subject to review. No appeal may be taken from the judgment and/or sentence of a commission to any civil court or higher military authority.

RULE MAKING POWER

22. Supplementary Rules and Forms. Each commission shall adopt rules and forms to govern its procedure, not inconsistent with the provisions hereof or such rules and forms as may be prescribed by the convening authority, to-wit, the Commanding General, United States Army Forces, China Theater.

By Command of Lieutenant General Wedemeyer:

(S) PAUL W. CARAWAY,
Brigadier General, GSC,
Acting Chief of Staff.

Exhibit "G"—Findings and Sentences

Colonel MALLAN. These findings and sentences are as follows:

You, Lothar Eisentrager, alias Ludwig Ehrhardt, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for the remainder of your natural life.

You, Ingward Rudloff, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

You, Bodo Habenicht, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

You, Hans Dethleffs, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for ten (10) years.

58 You, Heinz Peerschke, of the charge as amended Guilty, and are sentenced to be confined at hard labor, at such place as the reviewing authority may direct for five (5) years.

You, Hans Mosberg, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Johannes Rathje, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for fifteen (15) years.

You, Walter Richter, of the charge as amended Guilty and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Herman Jaeger, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Jesco von Puttkamer, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for thirty (30) years.

You, Alfred Romain, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for thirty (30) years.

You, Franz Siebert, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Erich Heise, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Oswald Ulbricht, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Hans Niemann, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

59 You, Felix Altenburg, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for eight (8) years.

You, Herbert Mueller, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

You, Siegfried Fuellkrug, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, Walther Heissig, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

You, August Stock, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

You, Maria Muller, of the charge as amended Guilty, and are sentenced to be confined at hard labor at such place as the reviewing authority may direct for five (5) years.

Exhibit "H"—Extracts from FM 27-10 "Rules of Land Warfare"

133. Judicial prosecutions; notice to protecting power. At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial.

This advise shall contain the following information:

(a) Civil status and rank of prisoner;

(b) Place of sojourn or imprisonment;

(c) Statement of the charges and specifications, with notice of the legal provisions applicable.

If it is not possible to indicate in such notice the court which will pass upon the matter, the date of opening of the trial and the place where it will take place, this information must be furnished to the representative of the protecting power later, as soon as possible, and at all events, at least 3 weeks before the opening of the trial (G. P. W., Art. 60).

Exhibit "I"

ARMY ADVISORY GROUP, CHINA,
OFFICE OF THE CHIEF.

APO 909.

10 May 1947.

In the foregoing case of Lothar Eisentrager, alias Ludwig Ehrhardt, et al., the following action is taken:

As to Lothar Eisentrager, alias Ludwig Ehrhardt, the sentence of confinement at hard labor for life is approved and will be duly executed.

As to Ingward Rudloff, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Bodo Habenicht, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Hans Dethleffs, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Heinz Peerschke, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Hans Mosberg, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Johannes Rathje, the sentence of confinement at hard labor for fifteen years is approved and will be duly executed.

61 As to Walter Richter, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Hermann Jaeger, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Jesco von Puttkamer, the sentence of confinement at hard labor for thirty years is approved and will be duly executed.

As to Alfred Romain, the sentence of confinement at hard labor for thirty years is approved, but ten years thereof is remitted. As thus modified the sentence will be duly executed.

As to Franz Siebert, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Erich Heise, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Oswald Ulbricht, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Hans Niemann, the sentence of confinement at hard labor for five years is approved and will be duly executed.

As to Felix Altenburg, the sentence of confinement at hard labor for eight years is approved and will be duly executed.

As to Herbert Mueller, the sentence of confinement at hard labor for ten years is approved and will be duly executed.

As to Siegfried Fuellkrug, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to Walther Heissig, the sentence of confinement at hard labor for twenty years is approved and will be duly executed.

As to August Stock, the sentence of confinement at hard labor for five years is approved, but three years thereof is

62 remitted. As thus modified the sentence will be duly executed.

As to Maria Mueller, the sentence of confinement at hard labor for five years is approved, but three years thereof is remitted. As thus modified the sentence will be duly executed.

Landsberg Prison, Landsberg, Germany, their present location, is designated as the temporary place of confinement until such time as a permanent place of confinement is designated by competent authority.

(S) JOHN P. LUCAS,
Major General, U. S. A., Chief.

A certified true copy:

PAUL L. OLNEY, *Captain, JAGD.*

Respondents' Exhibit One

HEADQUARTERS,
US FORCES, EUROPEAN THEATER,

APO 757.
AG 013.37 GAP-AGO. *11 July 1946.*

Subject: Designation of Prison for War Criminals

To: Commanding General, Third US Army Area.

1. The German penal institution at Landsberg, Germany, commonly known as the "Landsberg Prison", is hereby redesignated as the "War Criminal Prison" hereinafter referred to as the "prison".

2. All war criminals heretofore or hereinafter sentenced to imprisonment by specially appointed Military Government Courts for the trial of war crime cases conducted by the Deputy Theater Judge Advocate for War Crimes will be confined therein and all war criminals sentenced to death by such courts will be
63 confined therein pending final action by the reviewing or confirming authority, if any. Death sentences by such courts involving war criminals will be carried into execution in the prison.

3. The Commanding General, Third US Army will be responsible for the operation of the prison.

4. The employment of German personnel for the performance of routine functions in connection with the operation of the prison is permissible, however, American military or civilian personnel will be assigned to any positions necessary to assure adequate security.

5. All execution of death sentences will be carried out by and under the direction of American military personnel.

6. Security commensurate with the dangerous type of individuals confined in the prison will be maintained at all times.

7. Such part of the prison as is not required for the confinement of the individuals referred to in paragraph 2, above, may be utilized for the confinement of others sentenced to long terms of imprisonment insofar as such utilization does not endanger the general security of the prison.

By Command of General McNarney:

(S) GEORGE F. HERBERT,
Colonel, AGD,
Adjutant General.

Telephone: Frankfurt 2-3518.

DISTRIBUTION:
25—CG. 3rd US Army.
500—War Crimes Br JA Div.
5—TPM.
2—G–1.
2—G–3.
2—G–5.
5—OMG (US).

64 *Respondents' Exhibit Two*

War Department, Classified Message Center, Outgoing Classified Message

Paraphrase Not Required. Handle as Restricted Correspondence per Paras 44g and 53a, AR 380–5

Joint Chiefs of Staff.
Col C. R. Peck, Inf 77500.
27 December 1945.
Classification Cancelled.
Per SANACC Downgrading.
Proceedings on SWNCC 211/3.

(S) FRANK F. MITER.
Cd, GSC, 28 May 1948.

CG USFCT Shanghai China.
CG USFIBT New Delhi India.
CINCAFPAC Advance Tokyo Japan.
CINCAFPAC Command Manila PI.
CINCPOA Pearl Harbor Hawaii.
Number WARX 90285.

Book message to Wedemeyer and Terry for action; to MacArthur and Spruance for information from the Joint Chiefs of Staff.

The following directive approved by the State, War and Navy Departments is furnished for your guidance:

1. Primary responsibility for the apprehension, trial, and punishment of war criminals in India rests with the government of India, in Southeast Asia Command with SACSEA or such United Nations Governments as assume responsibility in succession to Southeast Asia Command, and in China with the Chinese Central Government. The United States may at its option elect to prosecute in any case where a war crime has been committed against an American National.

65 2. The Joint Chiefs of Staff desire that COMGENIB and COMGENCHINA do not establish courts for the trial of

war criminals without further authorization from the Joint Chiefs of Staff. It is desired, however, that both commanders furnish such information, evidence and other assistance as may be appropriate to assist the trial of war criminals by the authorities indicated in paragraph 1 above. Such assistance may include:

CM-OUT-90285 (Dec. 45).

a. The appointment of suitable officers of the United States Armed Forces to serve upon military courts appointed by other Allied Commanders where such appointments are requested and where offenses against United States Nationals are involved, and

b. Participation by United States Officers in the prosecution of cases involving offenses against United States Nationals.

c. Participation of United States Officers as observers at trials conducted by other Allied Governments in cases where offenses against United States Nationals are involved and which are not covered by the provisions of subparagraphs a and b above.

3. Report will be made to the Joint Chiefs of Staff on war criminals who have committed crimes against United States personnel, who in your opinion should be tried by a United States or International Tribunal.

4. Certain war criminals may be tried by International Tribunals in Japan as set forth in J.C.S. 1512 series already furnished addressees.

End.

ORIGINATOR: JC/S
INFORMATION: Adm Leahy; CG AAF; OPD; Adm Nimitz; C of S
CM-OUT-90285 (Dec. 45) DTG 272232z cc

court the writ must be directed to him. The Supreme Court said in Ex parte *McCardle*[35] that the jurisdictional act covers "every possible case of privation of liberty contrary to the National Constitution, treaties or laws". The statute must be so construed, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision.

There are expressions in opinions of courts to the effect that the writ runs not only to the jailer but to those who have power over him.[36] But we do not rest our decision upon those authorities. We rest it, as we have pointed out, directly upon the fundamental principles involved.

It is suggested that the foregoing result presents a practical problem of some difficulty. There are twenty-one of these appellants, and they are in Germany. To issue the writ would be to require that they be transported to this country for the hearing. But the Supreme Court made clear in *Walker* v. *Johnston*[37] and again in Ex parte *Quirin*[38] that this personal presence is not required as a first step. The District Court issued in this case a rule to show cause. Reply was made to the rule, and affidavits have been filed by the parties. Upon those papers, the controlling issues of law may be framed and presented in complete and satisfactory fashion. Upon the disposition of those issues, there may or may not remain other issues to be disposed of requiring the presence of the petitioners. But until that eventuality develops, the steps necessary to protect the rights of petitioners may be taken *seriatim*.

Upon its further consideration of the case, the District Court may find that one or more of respondents have no directive power, by line of authority, over the jailer of these appellants. That determination would depend upon statutes, executive orders, and War Department regulations. If such be found, the court will dismiss the action as to that or those respondents.

The judgment of the District Court dismissing the petition for lack of jurisdiction is reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

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[35] 6 Wall. 318, 325-326, 18 L. Ed. 816, 817 (1868).

[36] See Vaughan Williams, L. J., in Rex v. Crewe, *supra* note 14; Rivers v. Mitchell, 57 Iowa 193, 10 N. W. 626 (1881) (although this case related to the problem of custody of minor children); *Ex parte* Emerson, 107 Colo. 83, 108 P. 2d 866 (1940); People v. New York Juvenile Asylum, 57 App. Div. 383, 68 N. Y. S. 279 (1901); Sanders v. Allen, 69 App. D. C. 307, 100 F. 2d 717 (1938); *Ex parte* Fong Yim, 134 Fed. 938 (S. D. N. Y. 1905); Fielder v. Sadler, 193 Ga. 268, 18 S. E. 2d 486 (1942).

[37] 312 U. S. 275, 284, 85 L. Ed. 830, 61 S. Ct. 574 (1941).

[38] 317 U. S. 1, 24, 87 L. Ed. 3, 63 S. Ct. 1 (1942).

66 *Respondents' Exhibit Three*

War Department, Classified Message Center, Incoming Classified Message

PRIORITY—IVI

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51 (i) and 60 (a) AR 380–5.

From: CG, USF China Theater, Shanghai, China.
To: War Department.
Nr: CFB–28889.

19 April 1946.

To War attention SERVJAC CFB 28889 from CONGEN CHINA:

Reurad 15th April 8441 note Walter Hutchinson Department Justice will depart in two weeks for Shanghai. Earlier departure desirable due to filing of petition for Habeas Corpus Writ in Chinese court. Papers not served on this headquarters nor will service be accepted.

New Subject.

15–20 German soldiers, civilians and consular officials have been arrested for violation of German surrender terms by continuing organized intelligence espionage and radio monitoring activities in China against United States for use of Japanese until V–J Day. Local political situation makes trial by United States military commission in China strongly advisable. Request authority of Joint Chiefs of Staff to appoint such court and punish guilty after trial in about 30 days. Refer radio this headquarters to WAR dated 17th April CFBX 28719. As part of repatriation sentences, if any, to be served in Germany. Understand German surrender terms to be as follows "In the event of the German high command or any of the forces under their control failing to act in accordance with this Act of Surrender, the supreme commander allied expeditionary forces and the Soviet high command will take
67 such punitive or other action as they deem appropriate" to forestall raising of technical defense that only SHAEF and Soviet command can punish request appropriate delegation to appointing authority this headquarters to try and punish for surrender violation. Further request true copies of surrender instrument in English and German certified by Adjutant General or Secretary of State for use in evidence. Understand that Germany * * *

End.

*Being serviced.

United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 15, 1949, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 10053

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT &c., et al., APPELLANTS

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, PRETTYMAN and PROCTOR, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Per Circuit Judge PRETTYMAN.

Dated April 15, 1949.

NOTE: CFBX 28719 is CM-IN-3634 (18 Apr. 46) CAD
ACTION: ASF
INFO: OPD (Col. Carter)
CAD
CM IN-4053 (19 Apr 46) DTG 190736Z rmw.

War Department, Classified Message Center, Incoming Classified Message

IVI

Priority

Supplementary Copy

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51i and 60a, AR 380-5

From: Hq US Forces China Theater, Shanghai
To: War Department
Nr: CFB 28889

19 APRIL 1946.

To WAR attention SERVJAG CFB 28889 from COM GENCHINA:

Correct page 2-last line to read: Germany did not declare war on China. Please confirm.

End.

68 Note: Supplementary copy of CM-IN-4053 (19 Apr) ASF

ACTION: ASF
INFO: OPD (Col Carter)
CAD
CM-IN-4203 (20 Apr 46) DTG 190736Z wrb
Regraded Unclassified
Order Sec Army by TAG/8Y-306

Respondents' Exhibit Four.

War Department, Classified Message Center, Outgoing Classified Message

Paraphrase Not Required. Handle as Secret Correspondence per Paras 54 (i) and 60 (a). AR 380-5
Joint Chiefs of Staff.
Col. C. R. Peck, Inf.,
W. D. Extension 77500.
6 July 1946

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United States Court of Appeals for the District of Columbia Circuit. Filed May 17, 1949, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, et al., APPELLANTS

v.

JAMES A. FORRESTAL, et al., APPELLEES

Petition for Rehearing

Now comes the Appellants and petition the Court for an order granting a rehearing in the above-entitled cause, for the following reasons:

1. The Appellant sued in the District Court for the District of Columbia on behalf of himself and twenty others similarly situated for writs of habeas corpus, testing the legality of their confinement by the United States Army in Landsberg, Germany, following upon trial and conviction by a United States Military Commission convened in Shanghai, China.

2. The District Court issued a rule to show cause; and, upon the return of the rule, dismissed the petition. The Court held, on the authority of *Ahrens* v. *Clark*, 335 U. S. 188 (1948) that it was without jurisdiction to entertain a petition of habeas corpus on behalf of persons confined outside the territorial limits of the District of Columbia. Having dismissed the writ on jurisdictional grounds, the District Court did not reach the question whether the petition was sufficient as a matter of law, i.e., whether it set forth facts sufficient to state a cause of action for the relief requested.

3. Upon appeal to this Court, the Court reversed the judgment of the District Court and remanded the cause to the District Court for further proceedings.

4. The opinion of the Court, dated April 15, 1949, deals only with the question of jurisdiction. It does not pass upon the sufficiency of the petition as a matter of law. It is submitted that this question was properly before this Court upon appeal from the dismissal of the petition, and that it was necessarily presented for adjudication once the Court determined that dismissal by the District Court could not be justified on jurisdictional grounds.

5. The fundamental question in this case is the sufficiency of the petition as a matter of law. There is no substantial question of fact

Classification Cancelled per
SANACC Downgrading Proceedings on SWNCC 211/7

(S) FRANK F. METER,
Col. GSC, 28 May 1948.

COMGENUSAFC, Shanghai, China
Number: WAR 93586

To Wedemeyer from the Joint Chiefs of Staff.

Your radio CFB-28889 refers.

Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war and German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of German surrender terms; to proceed with the trials; and to approve and execute sentences, including the death penalty, subject to re-
69 view prescribed by the Commanding General of the U.S. Army Forces in China. You are further authorized to designate Germany as the place of confinement and execution of sentences of such convicted Germans as you may determine.

Office of Military Government for Germany (U.S.) concurs.

Note: CFB 28889 is CM-IN 4053 (19 April 46).
ORIGINATOR: JC/S
DISTRIBUTION: Admiral Leahy, CG AAF, D/PA, D/I D/SSP, D/PO, CAD, Admiral Nimitz, TAG, SERVAT, Mr. Petersen, Mr. Royall, C. of S.
CM-OUT-93586 (July 46) DTG 061703Z jjk

Respondents' Exhibit Five

War Department, Classified Message Center, Outgoing Classified Message

Classification cancelled per SANACC downgrading proceedings on SWNCC 211/7

(S) FRANK F. METER,
Col. GSC, 28 May 48.

Paraphrase Not Required. Handle as Secret Correspondence per Paras 51 (i) and 60 (a). AR 380-5.

Joint Chiefs of Staff.
W. D. Ext. 77500
Col. C. R. Peck, Inf.
9 July 1946

CO Nanking Headquarters Command, Nanking, China
Number: WAR 93751

herein. While the Government's reply would appear, at first blush, to raise two issues of fact, these issues, upon analysis, are clearly revealed to be issues of law. These issues are:

(a) Whether all of the respondents have directive power over the Commandant of Landsberg Prison. As the Court itself recognized in its opinion, determination of this issue "would depend upon statutes, executive orders, and War Department regulations", which are properly a matter for jurisdictional notice and judicial interpretation.

(b) Whether the prisoners were "civilians" or "soldiers." This issue is one of law, based upon all of the facts as to the status and activities of the prisoners, as set forth in the record of trial before the Military Commission. This record of trial is now before this Court as a part of the papers in the case.

6. No useful purpose would be served by sending this case back without disposing of the fundamental legal issues. The effect would be to subject the prisoners both to heavy financial burden and protracted delays. Under any circumstances, the case would have to come back to this Court, and it would return in virtually the same form and with the issues framed precisely as they now are.

7. The questions involved in the legality of the confinement have been fully briefed and argued. They are properly and necessarily before the Court upon this appeal from dismissal of the petition. Disposition of these issues by this Court would probably result in a final disposition of this case, since no substantial questions of fact are present. It is respectfully requested therefore, in the interests of expendition and economy, that the Court give consideration to and make disposition of these questions.

Respectfully submitted,

(S.) WALLACE M. COHEN,
Attorney for Appellants.

May 16, 1949.

Certificate of Service

I hereby certify that I have this day served the foregoing Petition for Rehearing upon counsel for all parties of record herein by mailing a copy thereof in a properly addressed envelope to each of the following:

Ross O'Donoghue, Esq., Assistant United States Attorney, Office of the United States Attorney, District of Columbia, Washington 1, D. C.

George Morris Fay, Esq., United States Attorney, District of Columbia, Washington 1, D. C.

To Commanding Officer Nanking Headquarters Command from the Joint Chiefs of Staff

Radio CFB-28889 refers.

70 Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial for violation of the laws and customs of war of German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of the German surrender terms; to proceed with the trials; and to approve and execute sentences, including the death penalty subject to review prescribed by the Commanding Officer Nanking Headquarters Command. You are further authorized to designate Germany as the place of confinement and execution of sentences of such convicted Germans as you may determine.

Office of Military Government for Germany (U. S.) concurs.

The foregoing was transmitted to COMGENUSAFC Shanghai as WAR 93586 on 6 July 1946.

End.

Note: CFB 28889 is CM-In-4053 (19 April 46)

ORIGINATOR: JC/S
DISTRIBUTION: Admiral Leahy, CG AAF, D/I, CAD, SERVAT, D/PO (Colonel Carter), Admiral Nimitz, Mr. Petersen, C/S.

CM-OUT-93751 (July 46) DTG 091908Z jjf

Respondents' Exhibit Six

War Department, Classified Message Center, Outgoing Clear Message

P & O 250.4 (30 Nov 46)
WDGS P & O Opns Gp Pacific
WDGPO Lt Col Muir/mhh 5505

3 DECEMBER, 1946.

CG Army Advisory Group. Nanking China.
Number: WCL 34266

71 From WDGPO reference your 595 of 30 November 46.

Authority is hereby granted to review, approve and execute sentences of War Crime cases adjudged by military commission appointed by Commanding General, Nanking Headquarters Command. Authority is hereby granted to review prior cases

John D. Lane, Esq., Assistant United States Attorney, Office of the United States Attorney, District of Columbia, Washington 1, D. C.

(S.) WALLACE M. COHEN,
Attorney for Appellants.

Dated: May 16, 1949.

United States Court of Appeals for the District of Columbia Circuit, April Term, 1949

No. 10,053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS,

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Before: Edgerton, Prettyman and Proctor, JJ.

Order

On consideration of appellants' petition for rehearing herein, It is Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated June 6, 1949.

United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 6, 1949. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 10053

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS,

vs.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Filed July 6, 1949. Joseph W. Stewart, Clerk.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ

tried by General Courts Martial appointed by Commanding General, Nanking Headquarters Command.

End.

595 is Mc-In-50113 (2 Dec 46)

ORIGINATOR: P & O
DISTRIBUTION: AAF, CAD, P & A, TAG, USW, JAG, QMC

MC-OUT-34266 (Dec 46) DTG 041407Z mcs

Filed Jan. 24, 1949

Respondents' Exhibit 4A

Copy of Translation

From Dr. Wank Shih-chieh, Minister for Foreign Affairs
To: His Excellency, Dr. J. Leighten Stuart, American Ambassador to China

No. Tung-35/12489.

Date: November 26, 1946.

Excellency:

In connection with the arrest and extradition of war criminals by the United States Army authorities in China, I have the honor to refer to Your Excellency's formal note no. 354 of August 19, 1946, stating the proposition that, with the exception of cases relating to the extradition of non-enemy war criminals, which should be dealt with through normal diplomatic channels, it would appear that prior to the complete establishment of peace Allied justice could be more effectively served if the arrest and extradition of enemy war criminals were to continue within the jurisdiction of the relevant Chinese and American military authorities.

72 The United States Forces are in China basically as a part of the China war area command. They fought in league with the Chinese forces against the enemy. Also, their machinery for the trial of war criminals is one of affiliated organs of the Headquarters of the United States Forces. These make for special circumstances, and in view of the same, as well as with a view towards facilitating the expeditious disposal of war criminals prior to the complete establishment of peace, the Chinese Government has now revised as follows the MEASURES GOVERNING THE ARREST, EXTRADITION AND TRIAL OF WAR CRIMINALS BY THE UNITED STATES FORCES:

(1) As regards those war criminals who have committed crimes against Americans only the American forces in China (are to)

advise the local military or police organ (who will) make arrest on their behalf; the American forces may render assistance in the arrest; subsequent to the arrest, the Headquarters of the American forces will apply to the Ministry of National Defense for extradition.

(2) The American military tribunal for the trial of war criminals, during the time that the American forces are in China, (will/may) temporarily undertake the trial of war criminals within the territory of China.

(3) The arrest or extradition of non-enemy war criminals shall continue to be dealt with through normal diplomatic channels.

I have the honor to indite the above reply for Your Excellency's attention.

Accept, Excellency, the renewed assurances of my highest consideration.

(Stamped) WANG SHIH CHIEH.
(Sealed) *Ministry of Foreign Affairs.*

United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 15, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10053

LOTHAR EISENTRAGER, Alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., APPELLANTS

v.

JAMES A. FORRESTAL, Secretary of Defense of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Argued February 8, 1949. Decided April 15, 1949

Mr. A. Frank Reel of the Bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of the Court, with whom *Mr. Wallace M. Cohen* was on the brief, for appellant.

Mr. Ross O'Donoghue, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, and *Mr. John D. Lane*, Assistant United States Attorney, were on the brief, for appellees.

Before EDGERTON, PRETTYMAN and PROCTOR, *JJ.*

PRETTYMAN, *J.*:

Appellant is a German national confined in Landsberg Prison, Germany, in the custody of the United States Army. He was a petitioner on behalf of himself and twenty others in the same situation,[1] for writs of habeas corpus in the District Court of the United States for the District of Columbia. Appellees are the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. They were respondents in the action below. The District Court dismissed the action for want of jurisdiction, upon the authority of *Ahrens* v. *Clark*.[2] The statute (Rev. Stat. 752, 28 U. S. C. A. 452 (now 28 U. S. C. A. § 2241)) is that "the several judges . . . of the district

[1] Collins v. Traeger, 27 F. 2d 842 (C. C. A. 9th 1928). Throughout this opinion we shall refer to all these persons as appellants.

[2] 335 U. S. 188, 92 L. Ed. —, 68 S. Ct. 1443 (1948).

of certiorari in the above-entitled cause, and include therein the following.

1. Joint Appendix, including Joint Appendix of Exhibits
2. Opinion.
3. Judgment.
4. Petition for Rehearing.
5. Order denying rehearing.
6. This designation.
7. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellees.

I hereby certify that I have this day served a copy of the foregoing Designation of Record on the following parties by mailing copies to them at their business addresses:

A. Frank Reel, 20 Pemberton Square, Boston, Mass.
Wallace M. Cohen, 1822 Jefferson Place, N. W., Washington, D. C.

PHILIP B. PERLMAN,
Solicitor General.

Dated: July 5, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 87, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals, as designated by counsel in the case of: Lothar Eisentrager, alias Ludwig Ehrhardt, on his own behalf and as next friend of Franz Siebert, et al., Appellants, v. James A. Forrestal, Secretary of Defense of the United States, et al., Appellees, No. 10,053, April Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this first day of August, A. D. 1949.

[SEAL.]

(S.) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States, October Term, 1949

No. —

JAMES V. FORRESTAL, Secretary of Defense of the United States, et al., PETITIONERS,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of Franz Siebert, et al., DEFENDANTS

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for writ of certiorari the printed record may consist of the following:

1. Joint Appendix, including Joint Appendix of Exhibits.

2. The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the Designation of Record filed by the Petitioners.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to certify and file with the Clerk of the Supreme Court of the United States the entire transcript of record on appeal in the United States Court of Appeals for the District of Columbia Circuit; and that in the event the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that any of the parties may refer in their briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioners.

Dated: July 5, 1949.

WALLACE M. COHEN,
Counsel for Respondents.

Dated: July 7, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 848387

courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus. . . ."

Prior to May 8, 1945, appellants were civilian employees of the German government in China.[3] On that date Germany surrendered. Thereafter, and until August 15, 1945, the cities in which appellants were located were under control of the military Forces of the Japanese Empire, which continued to wage war against the United States until that date. In August, 1946, appellants were served with charges of violation of the laws of war, in that they had engaged in military activity against the United States after the surrender of Germany. They were tried and convicted by a military commission.

This commission was a United States military commission, constituted by the Commanding General, Nanking, Headquarters Command, by delegation from the Commanding General, United States Forces, China Theater, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. No question of international action or authority is presented.[4]

The immediate jailer of appellants is the Commandant of Landsberg Prison, an American Army officer who derives his authority from the Commanding General, Third United States Army, and the Commanding General, United States Forces, European Theater (now designated Commanding General, European Command). The petition alleges that the Commandant of the Prison "is subject to the direction of the respondents". The reply of respondents to the rule to show cause says that the Commandant is subject to the supervision of the Commanding Generals of the United States Army in Europe "and not to that of respondents." This conflict in the pleadings seems merely to relate to the immediate physical custody of appellants, and not to concern the supervisory directive power of the Joint Chiefs of Staff or the Chief of Staff of the United States Army over the Commanding Generals. Such is the purport of the brief of respondents. For purposes of this appeal, we assume this to be the situation.[5] Appellants alleged and respondents admitted that appellants are confined in the custody of the United States Army.

Appellants alleged in their petition that their confinement is in violation of Articles I and III of the Constitution of the United States, of the Fifth Amendment thereto, and of other provisions of the Constitution and laws of the United States and of the Geneva

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[3] Whether they were employed in civilian agencies or by the armed forces is a disputed fact.

[4] *Cf.* Hirota v. MacArthur, 17 U. S. L. WEEK 4076 (U. S. Dec. 20, 1948).

[5] As to the Chief of Staff, see 32 STAT. 831 (1903), as amended, 10 U. S. C. A. § 33a.

Convention of July 27, 1929. They alleged that the military commission was without jurisdiction to try them or the offenses with which they were charged or in the manner in which the proceeding was had.

The question is whether the District Court has power to entertain appellants' petition. This is the question reserved in *Ahrens* v. *Clark*[6] and in Ex parte *Endo*.[7] In fact the question was not involved in the decision of those cases.

We must answer these questions: (1) Are these petitioners entitled to the writ[8] as a matter of substantive right? (2) If they are so entitled, could an omission in a federal jurisdictional statute deprive them of the privilege? (3) If they are entitled to the writ and cannot be deprived of the privilege, in what court does their petition lie, they and their immediate jailer being outside the territorial jurisdiction of any district court? The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases.

We shall not elaborate our discussion but merely state the principles from which we derive our conclusion.

1. We think that any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ. This conclusion necessarily follows from the following premises. *First*. The Fifth Amendment, by its terms, applies to "any person".[9]

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[6] *Supra* at 335 U. S. 192, n. 4.

[7] 323 U. S. 283, 305, 89 L. Ed. 243, 65 S. Ct. 208 (1944).

[8] We are dealing with the writ of habeas corpus *ad subjiciendum* only.

[9] Mr. Justice Murphy, dissenting in In Re *Yamashita*, 327 U. S. 1, 26, 90 L. Ed. 499, 66 S. Ct. 340 (1946), strikingly phrased the matter thus: "The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy

Supreme Court of the United States

Order allowing certiorari

Filed November 14, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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U. S. GOVERNMENT PRINTING OFFICE 1949

Second. Action of Government officials in violation of the Constitution is void.[10] This is the ultimate essence of the present controversy. *Third.* A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials,[11] and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power. *Fourth.* The writ of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty,[12]—"the best and only sufficient defense of personal freedom."[13] The writ is the indispensable implementation of constitutional guarantees in respect to personal liberty.

At common law the writ issued to test the validity of confinement under English authority beyond the seas, although the decided cases dealt with British subjects.[14]

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them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States."

[10] Johnson v. Zerbst, 304 U. S. 458, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); STORY, CONSTITUTION OF THE UNITED STATES § 1842 (5th ed. 1891).

[11] THE FEDERALIST, No. 78; STORY, *op. cit. supra* note 10, §§ 1573 *et seq.*, 1621, 1645.

[12] Many histories of the writ have been written, and in them may be found the development of its distinctive characteristics. CHURCH, HABEAS CORPUS (2d ed. 1893); HURD, HABEAS CORPUS (2d ed. 1876); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 108 *et seq.* (1938); 9 HALSBURY, LAWS OF ENGLAND 701 *et seq.* (2d ed. 1933); Note, 61 HARV. L. REV. 657 (1948); Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN B. REV. 92 (1938). Halsbury's Laws of England, *op. cit. supra*, states the English law to be: "The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty [p. 702]. . . . The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the Courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. [p. 703.] . . . The writ . . . is a prerogative writ. . . . It is also a writ of right. . . . [p. 704.] The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute. [p. 706.]"

[13] *In re* Rosier, 76 U. S. App. D. C. 214, 221, 133 F. 2d 316, 323 (1942).

[14] Carus Wilson's Case, 7 Q. B. 984, 115 Eng. Rep. 759 (1845); *Ex parte* Anderson, 3 El. & El. 487, 121 Eng. Rep. 525 (1861); Rex v. Crewe, 102 Law Times Rep. 760 (Ct. of App. 1910), is cited upon the English view of jurisdiction to issue the writ. Petitioner was in

It is established in our law [15] that enemy aliens may resort to

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the Bechuanaland Protectorate, South Africa, confined under authority of a proclamation of the High Commissioner, which rested upon the authority of an Order in Council, which in turn rested upon the authority of the Foreign Jurisdiction Act of 1890 (53 & 54 Vict. c. 37). The respondent was the Secretary of State for the Colonies. The King's Bench Division (Lord Alverstone, C. J., Ridley and Darling, JJ.) dismissed the petition upon the grounds that the writ could not issue to the Protectorate and could not issue to the Secretary of State. Upon appeal, the Court of Appeal, Supreme Court of Judicature (Vaughan Williams, Farwell and Kennedy, L. JJ.), affirmed, but principally upon the ground that a provision in the Proclamation that no writ calling in question the legality of the arrest or detention of this petitioner should have any effect, was valid. In the course of the opinion, the judges made clear their opinions that the writ could issue at the petition of persons beyond the seas and that the writ could be addressed to an official having authority over the jailer, although they thought that the High Commissioner and not the Secretary would be the proper respondent, since the Secretary had only advisory power. The lengthy discussions of the meaning and effect of the Foreign Jurisdiction Act and of the validity of the Order in Council and of the Proclamation, under British law, are not pertinent here. Parliament and the Crown together could, and did upon occasion, suspend the privilege of the writ, a power which Congress does not have.

The British Habeas Corpus Act of 1862 (25 & 26 Vict. c. 20) provided:

> "Sect. 1. No writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion."

This enactment seems to establish that prior to that time the writ did issue to dominions where there were courts of competent jurisdiction and also that after that date the writ might issue to any place, within British jurisdiction, where there are no courts competent to issue and execute the writ.

There is an English case, in 1939, in which Mr. Justice Cassels, in Vacation Court, held that although the writ would issue on behalf of aliens, it would not apply to an alien in a foreign country. The learned justice relied upon an expression of view by Lord Kennedy in Rex v. Crewe, *supra*. *In re* Ning Yi-Ching and others, 56 Times Law Rep. 3. *See* 6 SOLICITOR 196 (1939).

[15] *Ex parte* Quirin, 317 U. S. 1, 25, 87 L. Ed. 3, 63 S. Ct. 1 (1942); *In re* Yamashita, 327 U. S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946).

habeas corpus, and that habeas corpus is the proper proceeding by which to test the jurisdictional authority of military tribunals.[16]

If it be held that no court has jurisdiction to issue a writ of habeas corpus upon petition of a person confined outside the territorial United States, the ruling would deny the protection of the Constitution to citizens of the United States confined abroad by action of and in custody of officials of the United States. The only escape from that conclusion would be to distinguish between citizens and aliens.[17]

We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory. That is the nub of this whole matter. If the action of Government officials be beyond their constitutional power, it is for that reason a nullity. No more need be proven to establish its invalidity. Absent constitutional power, neither the objective nor the subject matter of an act is material. Whether given circumstances place a given action outside an apparent constitutional prohibition and so within constitutional power, is a different question, to be established by proof and not to be considered unless raised and supported. That is a matter of decision and not of judicial jurisdiction. For these reasons, we think that a distinction between citizens and aliens cannot be made in respect to the applicability of constitutional restrictions upon the power of government.

There is a vast difference between the delegated power of our Federal Government and the unrestricted power of the British Crown and Parliament.[18] Whatever may be the concept of restrictions upon governmental power in that country, and so of the applicability of the writ there, in this country constitutional restrictions are absolute and the writ must apply wherever such a restriction is transgressed and no other remedy is available.

Upon the foregoing considerations, we see no escape from the conclusion we have stated, that any person deprived of his liberty by an official of the United States Government in violation of constitutional prohibitions, has a substantive right to a writ of habeas corpus.

2. We think that if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal

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[16] Cases cited *supra* note 15, and *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866), and Duncan v. Kahanamoku, 327 U. S. 304, 90 L. Ed. 688, 66 S. Ct. 606 (1946).

[17] Wolfson, *Americans Abroad and Habeas Corpus; The Trap Begins to Close*, 10 FED. BAR J. 69 (1948).

[18] 1 BL. COMM. *9; STORY, CONSTITUTION OF THE UNITED STATES § 1614 (5th ed. 1891).

jurisdictional statute. This conclusion follows from these premises. *First*. The right to habeas corpus is an inherent common law right.[19] *Second*. The Federal Government cannot suspend the privilege, except when, in cases of rebellion or invasion, the public safety may so require.[20] This prohibition is in the First Article of the Constitution itself, its importance gauged by the fact that the Constitutional Convention did not leave the possibility of misunderstanding upon the topic to later determination, as they did the several prohibitions later incorporated in the first Ten Amendments. *Third*, Congress could not effectuate by omission that which it could not accomplish by affirmative action. So, if the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result.

It may be reasoned that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction",[21] and that, therefore, a federal court has no jurisdiction outside that which is conferred by a congressional enactment, a written law.[22] It might be, theoretically at least, that in ordaining and establishing and conferring jurisdiction upon the inferior courts, Congress might omit mention of some case or cases arising under the Constitution or laws of the United States. In such event, the argument from the above-stated premise might be that the contestants in that controversy were deprived of a forum for the adjudication of their dispute. We doubt that the affirmative conclusion to that proposition would be valid if the case concerned the authority of officials of the United States to act. It is established that a state court cannot inquire, upon petition for habeas corpus, into the validity of the confinement of a person held under the authority of the United States.[23] Therefore, unless the federal jurisdiction statute be construed as coextensive with governmental action by United States officials, such action outside the specifications of the statute would be wholly immune from judicial power; in other words, outside the necessity for compliance with the Constitution. To state the proposition would seem to refute it.

Moreover, the constitutional grant of judicial power to the Federal Government extends "to all Cases, in Law and Equity, arising under"

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[19] 3 BL. COMM. *131, *133.

[20] U. S. CONST. ART. I, § 9, cl. 2.

[21] Marshall, Ch. J., in *Ex parte* Bollman and *Ex parte* Swartout, 4 Cranch 75, 93, 2 L. Ed. 554, 561 (1807).

[22] See Dobie, *Habeas Corpus in the Federal Courts*, 13 VA. L. REV. 433, 441 (1927).

[23] Ableman v. Booth, 21 How. 506, 523, 16 L. Ed. 169, 176 (1859); Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 S. Ct. 544 (1884).

the Constitution and laws of the United States and under the treaties made under its authority.[24] And the Constitution further provides that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior courts as Congress may establish.[25] It was held early in our history that these provisions were compulsory upon Congress to confer the whole of the federal judicial power upon some federal court.[26] The Supreme Court has denied that it has jurisdiction to issue a writ upon petition of a person confined outside the United States.[27] It follows that if the case presented by these appellants arises under the Constitution, laws or treaties of the United States, as it clearly does, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself.[28]

In this connection, it is interesting to note that the constitutional prohibitions upon federal action contain no such proviso as Section 5 of the Fourteenth Amendment.

Upon the precise problem before us, we conclude that whatever may be the lack of forum in other cases, the Constitution specifically prohibits that result in respect to habeas corpus. Congress cannot suspend that privilege, unless there be invasion or rebellion.

3. We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.

The question here is not whether a court, either state or federal, can exercise its judicial power within the jurisdiction of another and

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[24] U. S. Const. Art. III, § 2, cl 1.

[25] U. S. Const. Art. III § 1.

[26] Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816); Story, Constitution of the United States §§ 1590-1597, 1702 (5th ed. 1891).

[27] *Ex parte* Betz, 329 U. S. 672, 91 L. Ed. 593, 67 S. Ct. 39 (1946).

[28] If it were to be held that Congress failed to confer upon the inferior federal courts the full judicial power vested in those courts by the Constitution, and that the residuum no so conferred remains in the common law courts until its exercise by federal courts is authorized by the Congress (reasoning similar to that employed with reference to constitutional grants of legislative power), the United States District Court for the District of Columbia could issue the writ in cases falling within that classification. That court is not only a federal court but also has the full common law powers originally held by the courts of Maryland. Organic Act of 1801, §§ 3, 5, 2 Stat. 103, D. C. Code p. XXXIII (1940).

independent government.[29] The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government.[30] We think that it can, if that be the only means of applying the Constitution to a given governmental action.

We perceive nothing singular in the application of judicial authority to those who have directive power, if such application is the only means of enforcing the prohibitive clauses of the Constitution.[31] "Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said—as in *Mooney* v. *Holohan*, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."[32]

The statute lends itself to a construction that it is coextensive with executive power, at least in so far as prisoners in jail are concerned. While it states the matter in the negative, it says: "The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, . . . or is in custody in violation of the Constitution or of a law or treaty of the United States; . . ."[33] The statute also says that the writ shall be directed to the person "in whose custody" the party is detained.[34] It is not too violent an interpretation of "custody" to construe it as including those who have directive custody, as well as those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements. Such an interpretation need not affect the doctrine that if the immediate custodian be within the jurisdiction of a federal

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[29] United States v. Tarble, 13 Wall. 397, 20 L. Ed. 597 (1872). There are numerous other cases involving that problem.

[30] Discussion of this topic usually goes back to the concurring opinion of Judge Cooley in *In re* Jackson, 15 Mich. 417, 433 (1867).

[31] McGowan v. Moody, 22 App. D. C. 148 (1903), rested upon the view that the Secretary of the Navy was not the proper party respondent, because he had advisory power only, much the same as the view of the judges as to the Secretary of State in Rex v. Crewe, *supra* note 14. *See* Sanders v. Allen, 69 App. D. C. 307, 100 F. 2d 717 (1938).

[32] Johnson v. Zerbst, 304 U. S. 458, 467, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).

[33] Rev. Stat. § 753, 28 U. S. C. A. § 453 before revision; now 28 U. S. C. A. § 2241.

[34] Rev. Stat. § 755, 28 U. S. C. A. § 455 before revision; now 28 U. S. C. A. § 2243.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

v.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 83) reversing the order of the District Court for the District of Columbia (R. 21) which dismissed the petition for writs of habeas corpus for lack of jurisdiction, and remanding for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 73-82) has not yet been reported. The opinion of the District Court (R. 21-22) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1949 (R. 83) and a petition for rehearing was denied June 6, 1949 (R. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. 2241 provides:

> *Power to grant writ*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within

their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

STATEMENT

On April 26, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the District of Columbia by respondents, 21 German nationals now confined in Landsberg Prison, Germany, in the American occupation zone, in the custody of the United States Army (R. 2-9, 10-11, 17). The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, and the members of the Joint Chiefs of Staff, as officials resident in the District of Columbia who "have jurisdiction and supervision over the official acts of the Commandant of Landsberg Prison" (R. 17).

The prisoners alleged that they had been employed by various civilian agencies of the German Government in China on and before May 8, 1945, when Germany surrendered to the Allies. They continued to reside in China thereafter under the control and domination of the military forces of the Japanese Empire. After the cessation of hostilities with Japan on August 15, 1945, these German nationals were charged by United States authorities with violations of the laws of war in having engaged in military activities against the United States after Germany surrendered. They were

tried and convicted as war criminals by a United States Military Commission appointed by the Commanding General of the Nanking Headquarters Command, and received sentences ranging from two years to life imprisonment. They are presently confined pursuant to those sentences in Landsberg Prison in the custody of the United States Army. In their petition the prisoners alleged that their trial and detention violates provisions of the Constitution and laws of the United States and of the Geneva Convention of July 27, 1929, relating to the treatment of prisoners of war. (R. 2-9, 10-11).[1]

The district court denied the petition for lack of jurisdiction, on the authority of *Ahrens v. Clark*, 335 U. S. 188 (R. 21-22). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit held that the district court has jurisdiction to entertain a petition for a writ of habeas corpus directed to those officials resident in the District who have ultimate authority over the immediate jailer in Germany. The judgment of the district court, therefore, was reversed and the case

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[1] Petitioners averred that (a) the offense with which they were charged did not constitute an offense against the laws of war; (b) the military commission had no jurisdiction in the absence of hostilities, martial law, or American military occupation of China; (c) the rules of procedure for the trial, and the trial itself, violated rights guaranteed to prisoners by Article 63 of the Geneva Convention; (d) the commission was without jurisdiction because the United States had failed to give notice to the protecting power under the Geneva Convention; and (e) petitioners were at all times civilians and therefore outside the jurisdiction of the military commission (R. 8-9, 11).

was remanded to determine whether such authority exists in the officials named as defendants, and, if so, to pass upon the merits of the petition (R. 82-83).

REASONS FOR GRANTING THE WRIT

In affording enemy aliens access to our courts to test their detentions by American officials any place in the world, the decision below is obviously of far-reaching importance. The Judge Advocate General of the Army has advised that this holding will breed delay and uncertainty in the finality of the judgments in all United States military government and war crimes trials and will impede the orderly administration of enemy occupied areas. There is no precedent in this Court for the application of the writ of habeas corpus to aliens confined outside the territory of the United States and we believe that if the jurisdiction of the District Court for the District of Columbia is to be so extensive [2] no less an authority than this Court should say so.

1. Since the writ of habeas corpus may be issued by district courts only "within their respective jurisdictions" (28 U.S.C. 2241(a)), and since those words "limit the district court to inquiries into the

[2] The number of petitions for habeas corpus filed in the district court from sources within the District itself constitutes a tremendous burden. *Dorsey* v. *Gill*, 148 F. 2d 857, 864-865 (C.A. D.C.). If, contrary to the decision below, it is not constitutionally imperative that petitions from prisoners detained abroad be entertained, and if Congress should see fit to extend the privilege of habeas corpus to such prisoners, the burden of passing upon such petitions may be distributed among the various district courts.

causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts" (*Ahrens* v. *Clark*, 335 U. S. 188, 190), it would seem that the court below improperly relied upon the absence of any other forum for alien enemies confined abroad as the basis for imputing to the District Court for the District of Columbia power to entertain their petitions. In *McGowan* v. *Moody*, 22 App. D. C. 148, 158, which is cited with apparent approval in the *Ahrens* opinion, the court said, "The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief might be had." And, as Mr. Justice Rutledge observed in his dissent in the *Ahrens* case (p. 209):

> * * * if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, * * * then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had * * *.

In the *Ahrens* decision this Court, it is true, reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights" (p. 192, fn. 4). And the author of the *Ahrens* opinion has since aligned himself with

the view of the court below that in such circumstances judicial power to issue the writ resides in that court which has within reach of its process a respondent who possesses directive power over the jailer outside of the country (Douglas, J., concurring in *Hirota* v. *MacArthur*, No. 239, misc. 1948 Term, decided June 27, 1949). But the reasoning by which this Court reached its conclusion in *Ahrens* that, where there is no detention within the district, there is by Congressional mandate a total absence of power to issue the writ, rather than a mere withholding of power in the interest of orderly administration, points directly to a similar complete failure of jurisdiction in cases of confinement abroad, at least where the prisoner is an alien enemy.[3]

2. a. In addition to its departure from the rationale of the *Ahrens* opinion, the decision below rests on very doubtful premises. Granted, as the court below said, that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow that a judicial rem-

[3] The conclusion that the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction of the court is reinforced by the recent revision of the statute in the new Title 28 of the United States Code, which added a new provision, Sec. 2242, to the former habeas corpus statute, to the effect that, if an application is made to this Court or to a circuit judge, "it shall state the reasons for not making application to the district court *of the district in which the applicant is held.*" [Italics supplied.] That section assumes that there must be detention within the territorial jurisdiction of a district court.

edy, perforce habeas corpus, is available to contest that action. One may well doubt the breadth of the basic premise (R. 76) that "In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power." Abundant exceptions come to mind, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution. As this Court observed in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111.

b. The court below stated that, unless Congress provides a forum for any petitioner entitled to the writ of habeas corpus, it would amount to a violation of the constitutional prohibition against suspension of the writ. Accordingly, the court felt constrained to construe the habeas corpus jurisdictional statute—despite its reference to the "respective jurisdictions" of the various courts and the gloss put upon that terminology in the *Ahrens* and previous decisions—to permit a petition to be filed in the district court with territorial jurisdiction

over the officials who have directive authority over the immediate jailer in Germany. But we think the premise that enemy aliens confined abroad are constitutionally entitled to the writ is of most doubtful validity. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we doubt that the framers of our Constitution contemplated it as a method for setting aside all void actions by government officials any place in the world, whether such actions affected citizens, friendly aliens or enemy aliens. The amplitude of the writ of habeas corpus as prescribed by the Constitution is probably no greater than it was at common law or under the English statutes at the time the Constitution was adopted. And we have been unable to find any authority for the proposition that the writ was then available in behalf of aliens confined in a foreign country. Cf. Church, *The Writ of Habeas Corpus* (2d ed. 1893), §§ 107, 108.[4]

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[4] In 1939, Great Britain exercised certain rights of administration and control in Tientsin, China, by virtue of a lease which it had acquired by treaty with China. Four Chinese were detained by British authorities and a writ of habeas corpus was sought in England, directed to the Foreign Secretary and to certain officials at Tientsin to have the four Chinese brought to England for the purpose of an inquiry into the legality of their detention. Judge Cassels, in Vacation Court, held that a writ of habeas corpus would not issue in respect of a foreigner detained in a foreign territory. *In re Ning Yi-Ching and others*, 56 The Times Law Reports 3. Although eminent counsel appeared in the case, the reporter noted that Judge Cassels "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm."

In his *History of English Law* (vol. 9, p. 116), Holdsworth reports that, prior to the Habeas Corpus Act of 1679, it was a common abuse for jailers to "move the prisoner about to evade service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." Legislation was enacted "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts" with resulting defeat of habeas corpus jurisdiction. *Id.* at p. 117. But the remedy adopted to prevent such illegal imprisonment beyond the seas was not the expansion of the court's jurisdiction but rather the enactment of more stringent sanctions, including the enhancement of damages in actions for such false imprisonment, provision for forfeiture of office upon conviction, ineligibility for pardon, etc. Habeas Corpus Act of 1679, Act of 31 Car. II, Section XII; Church. *The Writ of Habeas Corpus*, pp. 54-55.[5] It seems to have been assumed that detention within the jurisdiction of the court was necessary to authorize the issuance of the writ. Thus Holdsworth concluded (vol. 9, p. 124) that "it was a well-established principle that, though the writ could not issue into the foreign dominions of a prince who succeeded to the throne of England, and therefore not into Scotland or Hanover, it could issue into any other part of the king's dominions."

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[5] The Habeas Corpus Act of 1679 limited its sanctions against removal of prisoners to foreign lands to "any person or persons, subjects of this realm." Secs. IX, XI, XII.

c. In any case, there is no basis for holding that enemy aliens located in enemy territory have any substantive rights under our Constitution or laws which may be prosecuted through the writ of habeas corpus. The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country, and they cannot properly call upon the protections and rights stemming from our domestic or internal law. Congress may have indicated by its legislation an intention to grant certain rights under American law to enemy aliens found on American territory (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1; *Ludecke* v. *Watkins*, 335 U. S. 160), but this exceptional legislative solicitude should not serve as a point of departure to accord, without comparable legislative sanction, similar substantive rights under American law to enemy aliens living abroad to whom Congress has not been so generous. And it is, of course, highly unlikely that Congress would make available the procedural remedy of habeas corpus to alien enemies without any substantive rights to be vindicated by the writ.

d. We need not reach the question whether the writ is available to citizens of the United States detained in a foreign country by American officials. Cf. *Ex parte Betz*, and companion cases, 329 U. S. 672; *In the Matter of Bush*, 336 U. S. 971; *Bird* v. *Johnson*, 336 U. S. 950. One ground of distinction

is that the right of citizens to have the writ issue in their behalf—so long, at least, as they are detained in a place which is actually subject to the control or dominion of our Government—may have obtained at common law (cf. *Ex parte Anderson*, 3 El. and El. 487, 494 (1861, Q.B.), and thus have been a part of the concept of habeas corpus which was carried over into the Constitution and the statute. Another difference, as we have suggested, is that American citizens have substantive rights under American law which can be pressed by means of the writ, while enemy aliens living abroad have none. And in any case, it would not be antithetic to the Constitution or our history to hold that while our fundamental law may implicitly grant a universal right of freedom from detention by Americans to American citizens, it gives only a territorially limited right to aliens, whose rights frequently do not equal those of citizens. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 69-74. Enemy aliens detained *within* the territory of the United States are also unaffected by the position we take here, for resort by such prisoners to district courts has been held within the purview of the habeas corpus statute. *Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1.

For present purposes, it is enough to say that Congress is not required by the Constitution to give habeas corpus rights to alien enemies outside the country and has not expressed any intention of doing so. Whether Congress should extend the

same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance of foreign places of confinement to courts in this country, the availability of witnesses and their amenability to process of our courts, expenses of transportation, etc., as well as the need for expedition in the execution of our international undertakings in punishing war criminals and in occupying enemy areas. We submit that these are matters for legislative consideration—unfettered by the view of the Constitutional requirement on which the decision below is based.

e. Intertwined, of course, with the question of the jurisdiction of the district court in the case of applicants not detained within the court's territorial confines is the problem of whether governmental officials who have ultimate directive authority over the immediate jailer, as distinguished from actual physical custody, are proper respondents. The statute (28 U.S.C. 2243) provides that the writ "shall be directed to the person having custody of the person detained". In respect of a substantially similar provision in a predecessor statute this Court stated that Congress contemplated "a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he might be liberated if no sufficient reason is shown to the contrary." *Wales*

v. *Whitney*, 114 U. S. 564, 574. Certainly, the Secretary of Defense, the Secretary of the Army, and the other officials who were named respondents in no sense have "immediate" or "actual physical" custody of the prisoners, and, under such decisions as *McGowan* v. *Moody*, 22 App. D. C. 128, 163, *Jones* v. *Biddle*, 131 F. 2d 853 (C.A. 8), certiorari denied, 318 U. S. 784, and *Sanders* v. *Bennett*, 148 F. 2d 19 (C.A. D. C.), they were improperly named respondents. Although we have no reason to doubt that these officials have power to effectuate a mandate which the district court might issue for the release of the prisoners, that practical consideration (which is always present when the jailer is a government official responsible to a superior official resident in the District of Columbia) does not dispel our doubts that Congress intended the writ to be issued to them.

3. The extraordinary reach of the Court of Appeals' holding is suggested by the fact that several hundred thousand cases have been tried in Germany, Japan, and Italy by military government courts and other American-manned tribunals since United States troops first occupied those enemy countries in World War II. See Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany* (1947), 33 Am. Bar Assoc. J. 777; Nobleman, *The Administration of Justice in the United States Zone of Germany* (1946), 8 Fed. B. J. 70; Nobleman, *Procedure and*

Evidence in American Military Government Courts in the United States Zone of Germany (1947), 8 Fed. B. J. 212. In Germany and Japan many trials of this type continue to be held, as part of the control program demanded by the occupation of these great powers. On any assumption as to the disposition of this mass of cases, the decision below obviously has the broadest incidence.

CONCLUSION

It is respectfully submitted that a question of great importance which has not been, but should be, decided by this Court is involved, and, therefore, this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

v.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 53-62) is reported at 174 F. 2d 961. The opinion of the District Court (R. 16-17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1949 (R. 63) and a petition for re-

hearing (R. 64-65) was denied on June 6, 1949 (R. 66). The petition for a writ of certiorari was filed on September 1, 1949, and was granted on November 14, 1949 (R. 69). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U. S. C. [1948 rev.] 2241 [1] provides in pertinent part:

§ 2241. *Power to grant writ.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the

[1] This section, like all other sections of the 1948 revision of Title 28 of the United States Code, became effective September 1, 1948 (Act of June 25, 1948, c. 646, § 38, 62 Stat. 992). The petition for a writ of habeas corpus which gave rise to the present proceeding was filed prior to this effective date, on April 26, 1948 (R. 2-7), but the order denying the

district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

STATEMENT

On April 26, 1948, a petition for a writ of habeas corpus (R. 2-7; and see R. 7-8, 12-13, 15-16, for various amendments thereof) was filed in the United States District Court for the District of Columbia by respondents, 21 German nationals now confined in Landsberg Prison, Germany, in the American occupation zone, in the custody of the United States Army. The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, and the four Joint Chiefs of Staff of

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petition was entered after the effective date, on September 30, 1948 (R. 16). The pertinent subsection (a) of §2241 of the 1948 revision, however, introduced no substantive change in existing law. It merely consolidated, "with changes in phraseology necessary to effect the consolidation," §§ 451 and 452 of previous editions of Title 28 (R.S. §§ 751 and 752, as amended). See Reviser's Note to 28 U.S.C. [1948 rev.] 2241. These sections had read:

"§ 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

"§ 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeal[s] and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

the United States (Chief of Staff to the Commander in Chief, United States Army and Navy; Chief of Staff, United States Army; Chief of Naval Operations; and Commanding General, United States Army Air Forces), all of whom, the petition alleged, "are located within the District of Columbia" and "have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison" (R. 2, 12).

The petition, as amended, alleged that the prisoner-applicants for the writ had all been "employed by various civilian agencies of the German Government in Shanghai, Canton, and Peiping, in China" on and before May 8, 1945, when Germany surrendered to the Allies (R. 2, 8); that on January [illegible], 1947, they were found guilty,[2] following a trial by a United States Military Commission appointed by the Commanding General of the Nanking Headquarters Command, of "alleged violation of the laws of war" "by engaging in, permitting, or ordering military activity against the United States between the German surrender of May 8, 1945, and the cessation of Japanese hostilities on August 15, 1945," and sentenced to confinement at hard labor for periods ranging from five years to life imprisonment (R. 3-5); and that on May 10, 1947, Major General John P. Lucas, Chief of the United States Army Advisory Group, China (successor to

[2] Six codefendants of the respondents were found not guilty (R. 3).

the Nanking Headquarters Command), "acting as Reviewing Authority of the Military Commission," approved all the sentences (with certain remissions),[3] and ordered them executed, designating Landsberg Prison as the place of confinement (R. 6). The prisoners charged in their petition that their trial, conviction, and present detention were "in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States and of certain provisions of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war" (R. 6).[4]

A rule to show cause was issued (R. 7), to which a return was made (R. 9-11; and see R. 14-15 for amendments thereof) admitting some and denying

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[3] One 30-year sentence was reduced to 20 years, and two 5-year sentences were reduced to two years (R. 6).

[4] Specifically, it was charged that the Military Commission was without jurisdiction, or had violated the applicants' rights, because (a) the offenses with which the applicants had been charged did not constitute offenses against the laws of war; (b) there had been no "hostilities, martial law, or American military occupation of China" when the alleged offenses occurred; (c) the rules of procedure for the trial, and the trial itself, violated rights guaranteed to prisoners of war by Article 63 of the Geneva Convention to a trial "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power"; (d) the United States had neglected to give "notice of the trial to the protecting power of Germany," as required by the Geneva Convention; and (e) the applicants, "at no time having been members of the armed forces of a nation at war with the United States but having been at all times civilian employees of civilian governmental agencies, * * * were not belligerents" (R. 6, 8).

others of the allegations of the petition. An "answer" to the return, in the nature of a traverse, was also filed (R. 11-12). In view of the court's disposition of the petition for the writ (*infra*), however, it is unnecessary further to detail the various allegations of the pleadings.[5]

On September 30, 1948, the District Court (Tamm, D.J.) entered an order dismissing the petition for lack of jurisdiction (R. 16). In an accompanying opinion (R. 16-17), Judge Tamm pointed out that the applicants for the writ "admittedly are not now and have never been in the United States" (R. 16), and, accordingly, on the authority of *Ahrens* v. *Clark*, 335 U. S. 188, held that the court was without power to issue the writ "in cases in which the petitioners are not physically within the jurisdiction of the court" (R. 17).

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit held that the District Court has jurisdiction, at the instance of persons who are detained beyond the territorial limits of all federal district courts by officials of the United States, and who can show that their confinement is in violation of a prohibition of the Constitution, to entertain a petition for a writ of habeas corpus directed to those officials resident in the District of Columbia who have ulti-

[5] It is likewise unnecessary, for the same reason, to summarize the contents of the various exhibits attached to the petition for the writ (R. 18-43) and to the return to the show-cause order (R. 44-52).

mate authority over the immediate jailer. The judgment of the District Court was accordingly reversed and the cause remanded to determine whether such authority exists in the officials named as respondents, or any of them, and if so, to pass upon the merits of the petition (R. 62, 63).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined beyond the territorial limits of that court and other federal courts, pursuant to the judgment and sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

2. In holding that non-resident alien enemies detained for commission of war crimes have legal rights under the Constitution, laws, and treaties of the United States which may be asserted in United States courts.

3. In holding that persons who do not have actual physical custody of the prisoners may properly be named as respondents to a petition for a writ of habeas corpus.

4. In reversing the judgment of the District Court dismissing the petition for a writ of habeas corpus for lack of jurisdiction.

SUMMARY OF ARGUMENT

I

A. A federal district court is without jurisdiction to grant a writ of habeas corpus where the applicant for the writ is held in custody beyond the court's territorial jurisdiction. *Ahrens* v. *Clark*, 335 U. S. 188. Though the relators in the *Ahrens* case were confined within the territorial jurisdiction of a different district court from that in which the writs were sought—unlike the relators here, who are confined abroad and hence beyond the territorial jurisdictions of all district courts—that fact is irrelevant, under the rationale of the *Ahrens* case, and so cannot serve as a valid basis of distinction. For, *Ahrens* did not decide merely that the particular district court in which the writs were sought was justified, as a matter of discretion, in declining to exercise admitted jurisdiction because there existed another forum to which the applications for the writs should more appropriately have been addressed; but, rather, that the presence of the relators within the territorial confines of the district court in which the writs were sought was an essential prerequisite to the court's power to act.

B. Our contention that Congress never intended that the District Court for the District of Columbia should have power to issue writs of habeas corpus on behalf of prisoners confined outside the District

is supported not only by the habeas corpus provisions of the federal statutes generally applicable throughout the United States (particularly 28 U.S.C. §§ 2241 and 2242), but also by § 16-801 of the District of Columbia Code, which expressly limits the local district court's jurisdiction to issue such writs to cases of restraint "within the District."

C. The statutes of the states and territories, either in explicit terms or by clear implication, limit jurisdiction to issue writs of habeas corpus to cases where the prisoner-relators are confined within the territorial limits of the state or territory, or lesser political units. This is persuasive evidence that this limitation inheres in the very nature of the writ as inherited from the common law, and that Congress, in enacting the federal habeas corpus statutes, never intended to make the writ perform a broader function.

D. At common law, the writ of habeas corpus ran throughout England proper and to all the "dominions of the Crown." The early common-law decisions dealing with the territorial reach of the writ shed no light on the precise jurisdictional question involved in this case—*i.e.*, whether the writ was issuable to test the legality of the restraint of a prisoner detained on foreign soil by a jailer subject to the authority and control of an official who was within reach of the court's processes. However, Parliament, by enacting the Habeas

Corpus Act of 1679, which imposed severe penalties on jailers who transported prisoners "beyond the seas" for the purpose of evading service of writs of habeas corpus, would appear to have implicitly recognized that such removals defeated the jurisdiction of the English courts. In addition, modern English judicial authority supporting our contention that detention within the court's territorial jurisdiction is an essential prerequisite is to be found in at least one of the judgments in *Rex* v. *Earl of Crewe,* [1910] 2 K.B. 576, 102 Law Times Rep. 760 (C.A.), and also in the case of *In re Ning Yi-Ching and Others,* 56 Times Law Rep. 3, decided in 1939.

II

Though the persons named as respondents in the petition for the writ (petitioners in this Court)—the Secretary of Defense, the Secretary of the Army, and the Joint Chiefs of Staff of the United States—have ultimate directive authority over the immediate jailer of the prisoner-relators, they clearly do not have "immediate" or "actual physical" custody of the prisoners. It is doubtful, therefore, whether these highest officials of the military establishment can be considered "person[s] having custody of the person[s] detained" within the meaning of 28 U.S.C. 2243, which directs that writs of habeas corpus "shall be directed to" such persons. Cf. *Wales* v. *Whitney,* 114 U.S. 564, 574. Even though these officials might be able to effectuate a court mandate ordering the

prisoners' discharge, that practical consideration does not remove our doubts that Congress intended the writ to be issued to them. Moreover, permitting the writ to issue to parties such as petitioners foreshadows attempts to bring suit against any of the superiors of the actual custodian, including, perhaps, the President himself; and there will be unnecessary difficulties due to changes in supervision of overseas affairs, such as the recent transfer of authority, respecting occupied Germany, to the State Department. It may be that this objection to the parties is one which can be waived, but, if so, there has been no waiver here.

III

The duty which would devolve upon the District Court for the District of Columbia under the decision below—that of entertaining, considering, and passing upon every application for a writ of habeas corpus, emanating from any place in the world outside the United States, provided the applicant is detained by American officials purporting to act in their official capacities and makes the requisite allegation that his detention is somehow illegal—would constitute a burden so great that it is highly improbable that Congress ever contemplated such a result. Many of such petitions could be expected to present difficult problems of jurisdiction and possibly delicate questions of international law and foreign affairs. Many would necessitate issuance of the writs, followed by hearings requiring the attendance of distant witnesses,

And it is clear that the potential number of such applications is enormous. If it be thought that the validity of the confinement of every person detained by American officials in foreign lands should be subject to judicial scrutiny by writ of habeas corpus, legislation equitably distributing the burden of entertaining petitions for such writs among the different judicial districts, or setting up special courts for this purpose, is the answer to the problem.

IV

Alien enemies confined abroad are not entitled by the Constitution to the writ of habeas corpus, and there is therefore no occasion to attempt to construe the habeas corpus statutes as conferring upon the District Court for the District of Columbia, or upon any other district court, jurisdiction to inquire into the legality of their detention elsewhere in the world.

1. Granting that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow, as the court below assumed, that a *judicial* remedy is available to contest that action. There are many instances, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution. The President's authority in these spheres is an executive power, for which he is normally "responsible to the Constitution," and not to the courts.

An alien detained abroad by deputies of the President must seek redress for invaded rights through the executive and administrative machinery instituted for that purpose, as well as through the good offices of his own country's government.

2. Equally doubtful is the view of the court below that the habeas corpus statutes—if interpreted as not vesting power in the District of Columbia District Court to issue writs of habeas corpus where the alien-enemy applicants are detained beyond the territorial jurisdiction of all district courts—violate the constitutional prohibition against suspending the privilege of the writ except in time of rebellion or invasion. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we gravely doubt that the Constitution's draftsmen contemplated it as a method of setting aside, through the intervention of our domestic courts, all *ultra vires* actions by government officials any place in the world, even though such actions might affect only aliens or enemy aliens. The amplitude of the writ, as referred to in the Constitution, is probably no greater than it was at common law, and there is no authority for the proposition that it was then available in behalf of aliens confined in a foreign country. On the contrary, such authority as exists points the other way.

3. There is, moreover, no basis for holding that enemy aliens located and held in enemy territory have any substantive rights under our Constitution

or laws which may be prosecuted through the writ of habeas corpus. The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country. Cf. *Neely* v. *Henkel*, 180 U. S. 109; *In re Ross*, 140 U. S. 453, 464.

4. We do not believe that the Court must necessarily reach the question of whether the writ of habeas corpus is, and must be, available to citizens detained in a foreign country, and, if so, in what court it would lie. There are sound bases for distinguishing between citizens and aliens in this respect, as we think the foregoing discussion suggests.

V

If, however, it be thought that the issue here must be resolved as if petitioners were citizens, we would maintain that the Constitution does not entitle any person, citizen or alien, to habeas corpus as of right to test the legality of his detention abroad by American officials. The constitutional prohibition against suspension of the writ appears to have been designed to preserve the scope of the writ as it was then known, and the pre-Revolutionary history of habeas corpus cannot easily be harmonized with a claim of extra-territorial reach of the writ. Moreover, this Court has announced the fundamental principle that the Constitution, and particularly its specific prohibitions and requirements, have no operation in another country. See *In re Ross*,

140 U. S. 453, upholding the constitution and procedure of American consular courts in the Far East.

In particular, *Neely* v. *Henkel*, 180 U. S. 109, held the constitutional provision as to habeas corpus inapplicable to an American held in American-occupied Cuba after the War of 1898. The circumstances of that case are entirely comparable to those presented by the current occupations of enemy territory, and citizens now detained overseas are equally without the constitutional right to invoke the writ. It may be that it would be wise and just to make habeas corpus accessible in these circumstances, but, as with other such privileges, it is for Congress to make that choice.

ARGUMENT

I

A Federal District Court Is Without Jurisdiction to Issue a Writ of Habeas Corpus Where the Prisoner-Applicant Is Confined Beyond the Territorial Jurisdiction of the Court, Regardless of Whether He Is or Is Not Confined Within the Territorial Limits of Some Federal Court Having Jurisdiction to Issue the Writ

A. The Ahrens decision.—In *Ahrens* v. *Clark*, 335 U. S. 188, this Court held that the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)[6] was without jurisdiction to

[6] By §§ 88 and 132 (a) of new Title 28 of the United States Code, effective September 1, 1948 (Act of June 25, 1948, c. 646, § 38, 62 Stat. 992), the District Court for the District of Columbia was formally made an integral part of the federal judicial system, and its former name—the "District Court of the United States for the District of Columbia" (see D. C. Code (1940 ed.), § 11-301)—was changed to the "United States District Court for the District of Columbia."

issue writs of habeas corpus on behalf of a group of German aliens confined at Ellis Island, New York, awaiting deportation under removal orders issued by the Attorney General. The basis of this holding was the Court's determination that the words "within their respective jurisdictions," as used in 28 U. S. C. [1946 ed.] 452 (quoted in footnote 1, *supra*, pp. 2-3),[7] "limit the district courts to in-

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[7] As explained in footnote 1, this section and the immediately preceding section (451) of 28 U.S.C. [1946 ed.] were, effective September 1, 1948, consolidated and enacted into positive law, with merely phraseological changes, as § 2241 of new Title 28 of the United States Code.

The Court seems to have assumed without discussion that 28 U.S.C. [1946 ed.] 452 was the pertinent statute to be construed in the *Ahrens* case, rather than § 16-801 of the District of Columbia Code (1940 ed.), providing that "Any person committed, detained, confined, or restrained from his lawful liberty *within the District*, under any color or pretense whatever, * * * may apply by petition to the District Court of the United States for the District of Columbia, or any justice thereof, for a writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement, or restraint may be inquired into; and the court or the justice applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, * * *" [italics added].

Since the *Ahrens* case arose and was decided prior to September 1, 1948, when the District Court for the District of Columbia was for the first time expressly integrated into the general federal judicial system, and made in all respects one of the "United States District Courts" (see footnote 6, *supra*), it would seem to be arguable that the special habeas corpus statute applicable to the District of Columbia, quoted in the preceding paragraph, was applicable in that case, rather than 28 U.S.C. [1946 ed.] 452, the general federal statute creating habeas corpus jurisdiction. Cf. *Dorsey* v. *Gill*, 148 F. 2d 857, 867 (C.A. D.C.), certiorari denied, 325 U.S. 890; *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.); *McGowan* v. *Moody*, 22 App. D.C. 148, 156. On the other hand, by the Act of March 3, 1901, c. 854, § 61, 31 Stat. 1199, as amended (D.C. Code (1940 ed.), § 11-305), it was provided

quiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts" (335 U. S. at 190). The decision was not merely that the circumstances of that case were such that the district court, though having power to act, was justified, in the exercise of sound judicial discretion, in declining to assert its jurisdiction because there existed another forum with jurisdiction to which the applications for the writs should more appropriately or conveniently have been addressed. Rather, the decision was that the presence of the petitioners within the territorial confines of the district court was an essential jurisdictional prerequisite attached by Congress to the court's power to act at all. This is clear enough from the majority opinion in the *Ahrens* case,[8] and

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that the District Court for the District of Columbia "shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a court of the United States."

In any event, the point would appear to be without importance or significance in the present case, since the District Court for the District of Columbia is now an integral part of the federal judicial system, and hence clearly subject to the general federal habeas corpus statutes rather than to the special habeas corpus provisions of the District of Columbia Code, at least where there is any inconsistency between them.

[8] See, particularly, 335 U. S. at 193, where it was said:

"Respondent is willing to waive the point [the absence of the petitioners from the District of Columbia], so that we may make a decision on the merits. But the restriction is one which Congress has placed on *the power of the District Court to act*. Hence it may not be waived by the parties. [Citing *United States* v. *Griffin*, 303 U. S. 226, 229.]

* * * * *

"*Since there is a defect in the jurisdiction of the District Court* which remains uncured, we do not reach the question

becomes even clearer when the majority opinion is read in conjunction with the dissent of Mr. Justice Rutledge.[9] See, especially, 335 U. S. at 202, where Mr. Justice Rutledge stated that—

> * * * it is important to emphasize that the alternative to the Court's holding is not that petitioners have a right to be heard in a distant court whenever the Attorney General may there be served. Rather the alternative is that their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances if the respondent so desires or if the court finds that justice in the particular circumstances so demands.

It is true that the Court in the *Ahrens* case reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights" (335 U. S. at 192, footnote 4). But, as observed by Mr. Justice Rutledge in his dissent (335 U. S. at 209):

> * * * if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to

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whether the Attorney General is the proper respondent * * * and, if not, whether the objection may be waived, as respondent is willing to do. [Citing *Ex parte Endo*, 323 U.S. 283, 305-307.]" (Italics added.)

[9] Joined in by Mr. Justice Black and Mr. Justice Murphy.

> act, what lawyers call jurisdiction in the fundamental sense, then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had * * *.

If, in other words, a court lacks *power to act* because the applicant for relief is without its territorial confines, the fact that no other court happens to have power to act is, perforce, an irrelevant consideration. See Fairman, *Some New Problems of the Constitution Following the Flag,* 1 Stanford L. Rev. 587, 632. For, as stated in *McGowan* v. *Moody,* 22 App. D. C. 148, 158,[10] which is cited with apparent approval in the *Ahrens* opinion (335 U. S. at 190):

> The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief might be had.

It is also true that the author of the majority opinion in the *Ahrens* case has since aligned himself with the view of the court below that, where a person is confined in an area not subject to the jurisdiction of any district court, judicial power

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[10] The *McGowan* case held that the Supreme Court of the District of Columbia (now the United States District Court for the District of Columbia) was without jurisdiction to issue a writ of habeas corpus, directed to the Secretary of the Navy, on behalf of an enlisted man in the United States Marine Corps allegedly confined without lawful cause on the island of Guam.

to issue the writ resides in that court which has within reach of its process a respondent who possesses directive power over the immediate jailer (Mr. Justice Douglas, concurring in *Hirota* v. *MacArthur*, 338 U. S. 197, 199-203).[11] But, for the reasons stated above, we think that the fundamental basis of the *Ahrens* decision—the *ratio decidendi*—does not permit of such a conclusion. The holding in that case was that where there is no detention within the district, there is by congressional mandate a total absence of power to issue the writ—not merely that the fact of detention outside the district justifies or requires the non-assertion of admitted power in the interest of orderly administration. And, that being so, as we have said, both reason and authority dictate that the result cannot be otherwise merely by virtue of the extrinsic con-

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[11] Mr. Justice Douglas explained, in his concurring opinion in the *Hirota* case, his interpretation of what the Court held in *Ahrens*, as follows (338 U.S. at 201-202):

"* * * In *Ahrens* v. *Clark*, *supra*, we were dealing with the distribution of judicial power among the several District Courts. * * * We held that the court at the place of confinement was the court to which application must be made. But it does not follow that, where that place is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.

"* * * In *Ahrens* v. *Clark*, *supra*, denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. * * *.

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"* * * The allocation of jurisdiction among the District Courts, recognized in *Ahrens* v. *Clark*, is a problem of judicial administration not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ."

sideration that the place of detention happens not to be within the territorial limits of any federal court.

B. *The federal statutes and the District of Columbia Code.*—It seems clear from a reading of the habeas corpus provisions of the general federal statutes as a whole (28 U.S.C. [1948 rev.] 2241-2255) that Congress never contemplated that a federal court or judge should have power to issue a writ of habeas corpus where the prisoner-applicant for the writ was not confined within the territorial jurisdiction of such court or judge. The *Ahrens* opinion mentions some of the legislative indicia of this congressional intent (see 335 U. S. at 189-191), especially the limiting words "within their respective jurisdictions" in § 2241 (formerly 28 U.S.C. [1946 ed.] 452). Further evidence is to be found in the fourth paragraph of § 2242, providing that—

> If addressed to the Supreme Court, a justice thereof or a circuit judge it [*i.e.*, the application for the writ] shall state the reasons for not making application to the district court of *the district in which the applicant is held.* [Italics added.]

And the second sentence of § 2241(a) (see pp. 2-3, *supra*) states that—

> The order of a circuit judge [granting a writ of habeas corpus] shall be entered in the records of the district court of *the district*

wherein the restraint complained of is had. [Italics added.]

The District of Columbia Code makes it even clearer that jurisdiction to issue the writ is limited to cases where the person confined is within the District. Section 16-801 of the Code (1940 ed.), as we have pointed out (footnote 7, *supra*, p. 16) expressly limits the jurisdiction to issue the writ to cases of restraint "within the District." See *McGowan* v. *Moody*, *supra*, 22 App. D. C. 148, 156, where it was conceded on all sides that, if the local District Court (then the Supreme Court of the District of Columbia) derived its habeas corpus jurisdiction exclusively from this Code provision, there was no power to issue the writ where the applicant was detained outside the District—in that case, on the island of Guam.[12] See also *Ex parte Flick*, 76 F. Supp. 979 (D.D.C.),[13] where it was held (Holtzoff, D. J.), on the authority of the *McGowan* case, that the District Court lacked jurisdiction to issue a writ of habeas corpus to inquire into the legality of the detention of a German alien

[12] It was argued on behalf of the appellant in the *McGowan* case that the then Supreme Court of the District of Columbia had, in addition to the powers conferred on it by the Code, "all the jurisdiction in the premises that belonged to the court of King's bench in England under the common law" (22 App. D. C. at 156-157). The court assumed, for argument, that this was true, and decided that even so there was no power to issue the writ.

[13] Affirmed on other grounds (the international character of the tribunal that convicted Flick) *sub nom. Flick* v. *Johnson*, 174 F. 2d 983 (C.A. D.C.), certiorari denied, 338 U.S. 879.

confined in Nuernberg, Germany, by virtue of a judgment and sentence of a military tribunal sitting in that city.[14] Cf. *Sanders* v. *Bennett*, 148 F. 2d 19 (C.A. D. C.).

It is true that for some years prior to this Court's decision in the *Ahrens* case the District Court for the District of Columbia entertained petitions for writs of habeas corpus filed by prisoners confined in the District of Columbia Reformatory at Lorton, Virginia, and the District Workhouse at Occoquan, Virginia. This practice appears to have had its origin in the case of *Sanders* v. *Allen*, 100 F. 2d 717, 718-719 (C.A. D. C., 1938), where it was pointed out that these institutions were controlled and staffed by District officials, were integral parts of the local jail system, and were located in Virginia only because of a lack of available and suitable land in the District for the purpose. The situation was described by the court as "sui generis and as in no way analogous to sentence and confinement of a prisoner convicted of a violation of a United States statute in one of the other Federal District Courts, sitting in one of the States. In other words, the problem here is local and has no relation to federal procedure generally" (100 F. 2d at 719). The court made it clear, moreover, that, in deciding that the local Dis-

[14] The basis of the District Court's *Flick* decision, though the decision itself was affirmed by the Court of Appeals on other grounds (see footnote 13, *supra*), was, of course, in effect overruled by the decision below in the instant case.

trict Court had jurisdiction in the peculiar circumstances of that case, it was not departing "in the slightest degree" from the principle of the *McGowan* decision (*ibid.*). Subsequent decisions of the Court of Appeals reaffirmed the principle of the *Allen* decision, always, however, limiting it to its special facts. See *Sanders* v. *Bennett, supra,* 148 F. 2d 19; *Burns* v. *Welch,* 159 F. 2d 29. In consequence of this Court's decision in the *Ahrens* case, however, even the limited exception to the general rule which those cases established has now been abrogated, and the strict principle requiring physical presence within the District of the applicant for habeas corpus in order for jurisdiction to exist has been reverted to.[15] *McAffee* v. *Clemmer,* 171 F. 2d 131 (C.A. D.C.); *Butler* v. *Clemmer,* 171 F. 2d 132 (C.A. D.C.).

C. *State and territorial legislation.*—Each of the 48 states and the several territories of the United States has detailed legislation on the subject of the writ of habeas corpus.[16] These statutes follow the general pattern fixed by the English Habeas Corpus Act of 1679, 31 Car. II, c. 2,[17] with, however, numerous changes and additions, varying from

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[15] With, of course, the new exception created by the decision below in the case at bar.

[16] The state and territorial habeas corpus statutes, as they existed in 1923, are collected in Scott and Roe, *The Law of Habeas Corpus,* pp. 515-997. Only in isolated instances have the statutes been amended in matters of substance since the publication of this work.

[17] See pp. 37-41, *infra,* for a discussion of this most celebrated of the English habeas corpus acts. It has been referred

state to state, designed to meet modern conditions. Hurd, *The Writ of Habeas Corpus* (2d ed. 1876), pp. 122-128. While it is recognized, of course, that the provisions of these statutes have no authoritative bearing on the question of the reach of the writ under federal law, it is not without significance, we think, that in every instance, either in explicit terms or by clear implication, jurisdiction to issue the writ is limited by these statutes to cases where the detained petitioner is confined within the territorial limits of the state or territory, or even within narrower limits (the county, district, etc.) where the jurisdiction of the court or judge issuing the writ has narrower territorial jurisdiction. This universal conception of the writ as being thus jurisdictionally limited to the territory where the detained person is confined is persuasive evidence that this limitation inheres in the very nature of the historic writ, and that there was no intention on the part of Congress, when it enacted the federal habeas corpus statutes, to make the writ perform a broader function.

In the following jurisdictions, the territorial limitation is expressly contained either in the statutory section creating the right to the writ,[18]

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to as "the basis of all the American statutes on the subject" (2 Kent, *Commentaries on American Law* (14th ed. 1896), p. 28).

[18] Typical of the statutes in this category is that of Michigan (Compiled Laws, 1929, § 15206), which provides:

"Every person committed, detained, confined or restrained of his liberty *within this state*, for any criminal or supposed criminal matter, or under any pretense whatsoever, • • •

or in that defining the jurisdiction of the courts and judges empowered to grant it: [19]

Alabama:	Code, 1940, Tit. 15, § 1
Alaska:	Compiled Laws, 1949, § 66-26-1 (see also § 66-26-32)
Arizona:	Revised Stats., 1913 (Penal Code), Tit. 23, § 1347
Colorado:	Stats. Ann., 1935, c. 77, § 20 (see also §§ 4, 14)
Connecticut:	General Stats., 1949, § 8202
Georgia:	Code, 1933, § 50-103
Idaho:	Code Ann., 1947, § 19-4203
Illinois:	Revised Stats., 1945, c. 65, § 2
Indiana:	Burns' Stats. Ann., 1933, § 3-1905
Louisiana:	Code of Practice (Dart ed. 1942), Art. 792
Maine:	Revised Stats., 1944, c. 113, § 6
Maryland:	Flack's Ann. Code, 1939, Art. 42, §§ 1, 3
Massachusetts:	Ann. Laws, 1933, c. 248, § 2
Michigan:	Compiled Laws, 1929, § 15206 (see also §§ 15208, 15215)
Minnesota:	Stats., 1941, § 589.02
Mississippi:	Code Ann., 1942, § 2819
Missouri:	Revised Stats., 1939, § 1590 (see also § 1639)
Montana:	Revised Codes, 1947, § 94-101-3 (see also § 94-101-25)
Nebraska:	Revised Stats., 1943, § 29-2801 (cf. § 29-2812)
New Jersey:	Revised Stats., 1937, § 2:82-12 (see also §§ 2:82-3, 2:82-9, 2:82-14)
New Mexico:	Stats. Ann., 1941, § 25-1103
New York:	Civil Practice Act, 1937, § 1230 (see also § 1232)
North Carolina:	Code, 1939, § 2205 (see also § 2210)
North Dakota:	Revised Code, 1943, § 32-2204 (see also §§ 32-2229, 32-2238)
Oregon:	Compiled Laws Ann., 1940, § 11-401 (see also §§ 11-429, 11-442)
Pennsylvania:	Purdon's Stats. Ann. (Perm. ed.), Tit. 12, § 1871
Vermont:	Pub. Laws, 1933, § 2026 (see also § 2045)
West Virginia:	Code, 1943, §§ 5324, 5325
Wisconsin:	Stats., 1947, § 292.03 (see also §§ 292.05, 292.33)

In other states, while the statutory sections creating the right to the writ and defining generally the jurisdiction of the courts empowered to grant it do not expressly condition the power to issue the writ on the physical presence of the applicant

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may prosecute a writ of habeas corpus * * * to inquire into the cause of such imprisonment or restraint" [italics added].

[19] A typical statute in this category is that of Indiana (Burns' Stats. Ann., 1933, § 3-1905), which provides:

"Writs of habeas corpus may be granted by the circuit or superior courts of *the county in which the person applying therefor may be restrained of his or her liberty*, or by the judges of said courts, whether in term or vacation; * * *" [italics added].

within the territorial confines of the state (or lesser political or judicial subdivision), this condition is clearly implied from the language of a special section (common also to many of the states in the foregoing list) requiring courts and judges, upon learning from judicial proceedings before them that a person is probably illegally confined "within their jurisdiction," to issue a writ of habeas corpus for his relief without the necessity of a petition therefor:[20]

Arkansas:	Stats., 1947, § 34-1742
Iowa:	Code, 1946, § 663.11
Tennessee:	Williams' Code Ann., 1934, § 9680 (see also §§ 9684; 9705)
Texas:	Code of Crim. Procedure, 1925, Art. 128 (see also Arts. 120, 121, 129)
Utah:	Code Ann., 1943, § 104-65-10 (see also §§ 104-65-14, 104-65-23)
Wyoming:	Compiled Stats., 1945, § 3-6510 (see also §§ 3-6503, 3-6504, 3-6514).

In the following jurisdictions, the requirement that the person detained be within the jurisdiction is implied from the provision (common also to many of the states in the two preceding lists) calling for summary seizure of the prisoner by warrant and bringing him before the court whenever it appears to the court that there is cause to believe he

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[20] A typical statute of this type is that of Iowa (Code, 1946, § 663.11), which provides:

"When any court or judge authorized to grant the writ has evidence, from a judicial proceeding before him, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue the writ or cause it to be issued, on its or his own motion"

will be removed from the jurisdiction before he can be relieved by a writ of habeas corpus: [21]

California:	Penal Code, 1949, § 1497
Hawaii:	Revised Laws, 1945, § 10365
Kansas:	General Stats., 1935, § 60-2218
Nevada:	Compiled Laws, 1929, § 11404
Oklahoma:	Stats., 1941, Tit. 12, § 1348
Porto Rico:	Code of Crim. Procedure, 1935, § 492
Washington:	Remington's Revised Stats. Ann., 1931, § 1080

Certain states make it a punishable offense for anyone having in his custody a person for whose relief a writ of habeas corpus has been issued to remove such person from the jurisdiction of the court issuing the writ with the intent to "avoid the effect thereof." [22] This would seem to indicate implicit recognition that removal of the prisoner beyond the territorial jurisdiction of the court issuing the writ (before service thereof) would oper-

[21] A typical statute of this type is that of California (Penal Code, 1949, § 1497), which provides:

"When it appears to any court, or judge, authorized by law to issue the writ of habeas corpus, that anyone is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law."

[22] For example, it is provided by Nevada Compiled Laws, 1929, § 11412, that "Any person having in his custody or under his restraint or power any person for whose relief a writ of habeas corpus shall have been duly issued * * *, who, with the intent to elude the service of such writ, or to avoid the effect thereof, * * * shall remove him or her without the jurisdiction of such judge, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding five thousand dollars."

ate to defeat the court's jurisdiction. The following states have such laws; the list is not exhaustive, and some of the states listed appear in one of the previous lists:

California:	Penal Code, 1949, § 364
Colorado:	Stats. Ann., 1935, c. 77, § 14
Idaho:	Code Ann., 1947, § 19-4236
Illinois:	Revised Stats., 1945, c. 65, § 30
Nevada:	Compiled Laws, 1929, § 11412
Ohio:	Throckmorton's Code Ann., 1940, §§ 12185-12186 (see also § 12163)
South Dakota:	Code, 1939, § 37.9905
Tennessee:	Williams Code Ann., 1934 § 9705

In Delaware (Revised Code, 1935, § 4932) and Florida (Stats., 1941, § 79.03), the statutory provisions dealing with the manner of serving the writ similarly indicate implicit recognition of physical presence of the person detained within the state as a jurisdictional prerequisite to issuance of the writ.

Only in the following states do the habeas corpus statutes lack *particular* provisions from which can be inferred recognition of the prisoner's presence in the state as a condition of the courts' power to compel production of the body by the writ; even in these states, however, there is no affirmative statutory indication that such presence is not required; on the contrary, the statutory provisions *as a whole* reflect the contrary attitude, in consonance with that of the other states:

Kentucky:	see Carroll's Codes (Russell's Revision, 1948), Crim. Code, §§ 399-429
New Hampshire:	see Revised Laws, 1942, c. 406, §§ 1-32
Rhode Island:	see General Laws, 1938, c. 584, §§ 1-31
South Carolina:	see Code of Laws, 1942, §§ 1047-1066
Virginia:	see Code, 1950, §§ 8-596-8-609

It is true, of course, that prisoners held under the authority of a state (or territorial) government are

usually if not invariably detained within the borders of the particular state; and that, on the other hand, substantial numbers of the prisoners detained under the authority of the United States, as a result of the recent global war and the far-flung American military occupation of foreign areas, are confined abroad, beyond the jurisdictional limits of the federal courts having habeas corpus jurisdiction. Consequently, the states, as distinguished from the United States, have seldom, if ever, been confronted with the precise jurisdictional problem presented by this case. We recognize the force of these considerations, but we believe, nevertheless, that the universality of the states' conception of the writ as inherently containing the jurisdictional limitation for which we contend demonstrates that this limitation was embodied in the writ as inherited from the common law. In these circumstances, it would require very clear and persuasive evidence to show that Congress, in enacting the federal habeas corpus statutes, intended to eliminate the limitation in question and thereby make the writ perform a broader function.

It may be that it would be the part of wisdom and consonant with present-day conceptions to expand the traditional scope of the writ so as to make it serve to test, in American civil courts, the legality of detentions occurring anywhere in the world, provided the detention is by the authority of

the United States, or its military or civilian officers. We submit, however, that if the traditional scope of, and jurisdictional limitations upon, the writ are thus to be expanded, it should be done, not by judicial construction, but by congressional enlargement of the writ in the light of modern conditions.[23]

It is also true that, despite the explicit or implicit jurisdictional qualification of the writ in state statutes, limiting its scope to cases where the applicant is detained within state borders, there have been decisions creating apparent exceptions to this general principle in a particular type of habeas corpus proceeding. In proceedings involving disputes between parents concerning the custody of a minor child, some states have adopted the view that the child's absence from the jurisdiction does not defeat jurisdiction to test the legality of a particular parent's custody, provided the parent exercising custody is within reach of the issuing court's processes. *Rivers* v. *Mitchell*, 57 Iowa 193

[23] Congress could, for instance, spread the burden of considering habeas corpus petitions emanating from overseas among the federal districts, or create a new court or courts for this purpose if in its judgment such action was warranted, a matter obviously beyond the capacity of this Court. (See Wolfson, *Americans Abroad and Habeas Corpus*, 9 Fed. Bar Journ. 142, 150-152; for a proposed remedial statute; and see pp. 58-59, 70-71, 77, *infra*, for a further discussion of congressional action as a possible solution to the problems presented by this case.) For our answer to the view of the court below that a proper interpretation of the Constitution, and particularly the constitutional prohibition against suspending the writ of habeas corpus, makes for present jurisdiction in the District Court for the District of Columbia, see pp. 59-77, *infra*.

(1881); *Breene* v. *Breene*, 51 Colo. 342, 345-346 (1911); *Shaw* v. *Shaw*, 114 S. C. 300 (1920); cf. *People ex rel. Billotti* v. *New York Juvenile Asylum*, 57 App. Div. (N. Y.) 383 (1901); and see *In the Matter of Jackson*, 15 Mich. 417 (1867), where the judges of the Supreme Court of Michigan were equally divided on the question. We believe, however, that cases of this type are *sui generis*, and not authority for the proposition that in the ordinary habeas corpus case, where the applicant for the writ is a mature adult personally challenging the legality of his confinement by another, the former's absence from the jurisdiction of the court is not a jurisdictional defect. As the Iowa Supreme Court pertinently observed in the *Rivers* case, *supra*, 57 Iowa at 195:

> * * * These contests between husbands and wives, who are living separate and apart from each other, as to the custody of their minor children are peculiar. Although denominated proceedings in *habeas corpus*, they are unlike the ordinary proceedings for the release of a party held upon a criminal charge. Although the minor child is denominated as the applicant for the writ, no contest is made by him. It is really a controversy between the father and mother, and the question for the court to determine is, which of the contestants is the more suitable person to have the control and custody of the child. * * *

See also Wolfson, *Americans Abroad and Habeas Corpus*, 9 Fed. Bar Journ. 142, 148.

D. *The territorial reach of the writ at common law; the English Habeas Corpus Acts; modern English decisions.*—Inquiry into the question of the territorial reach of the writ of habeas corpus at common law for light on the jurisdictional issue before the Court is justified by the familiar principle that—though the common law may not be invoked to enlarge or contract jurisdiction, rights, or remedies created and defined by statute—it is nevertheless permissible to look to that law for the meaning of common-law terms used in a statute, and for assistance in determining the scope and incidents of writs provided for by statute under their common-law names in cases where the statute itself does not plainly and unequivocally settle such questions. "Habeas corpus" is, of course, such a term and such a writ. *McNally* v. *Hill*, 293 U. S. 131, 136; *Ex parte Bollman*, 4 Cranch 75, 93-94; *Ex parte Watkins*, 3 Pet. 193, 201-202; *Ex parte Randolph*, 2 Brock. 447, 20 Fed. Cas. 242, 253 (C. C. D. Va.); Church, *The Writ of Habeas Corpus* (2d ed. 1893), § 76.

While the early common-law decisions dealing with the territorial reach of the writ shed no light on the precise jurisdictional question before the Court—the point seemingly never having arisen in England until relatively modern times—the cele-

brated Habeas Corpus Act of 31 Car. II, c. 2 (1679) offers a more fruitful source of inquiry. This Act, having been enacted long prior to the adoption of the American Constitution, may perhaps be now considered of sufficient antiquity to be treated in this country, for practical purposes, as part of the common law itself. In addition, there are a number of modern English decisions which, though providing no final and satisfactory English answer to the question posed at bar, nevertheless require consideration in any full inquiry into precedents on the issue before the Court. The following survey of the development of the law of habeas corpus in England, viewed from the particular standpoint of the jurisdictional issue here presented for determination, is accordingly presented for the Court's consideration.

1. At common law, jurisdiction to issue the writ of habeas corpus was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and, "in a case of privilege," by the Court of Exchequer.[24] 9 Halsbury's *Laws of England* (2d ed.), p. 706. These were, of course, superior courts whose jurisdiction extended throughout England, and hence were more analogous in this respect to the superior courts of the American states than to

[24] This jurisdiction is now exercised by the King's Bench Division and the judges of the High Court of Justice, by virtue of the Supreme Court of Judicature (Consolidation) Act of 1925. 9 Halsbury, *op. cit. supra*, p. 706, and note (s).

the district courts in the federal system, whose territorial jurisdictions, fixed by arbitrary geographic lines, do not extend throughout the nation. The writ ran throughout England proper ("the King's realm") as well as to all the dominions of the Crown.[25] Church, *The Writ of Habeas Corpus* (2d ed. 1893), § 107. Thus it was early established that the writ would issue to any of the so-called Cinque Ports,[26] to the Counties Palatine,[27] to the Channel Islands, Jersey and Guernsey,[28] to Ire-

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[25] With the exception, however, of Scotland. This exception arose, it seems, from a historical accident, explained in 9 Halsbury, *op. cit. supra*, p. 709, and note (i), as follows: "The writ of *habeas corpus* does not run in Scotland. * * * Until the accession of James I. in 1603, when the Crowns of England and Scotland were united, Scotland was regarded by the common law as a foreign dominion to which the prerogative writs would not lie, and the writ of *habeas corpus* is unknown to the law of Scotland."

[26] *Richard Bourn's Case* (K.B., 1619), Cro. Jaq. 543, 79 Eng. Reprint 465. The Cinque Ports were five seaport towns on the coast of Kent and Sussex (Dover, Sandwich, Romney, Hastings, and Hythe), to which, in return for special sea service in defense of the coast, special jurisdictional privileges and exemptions were granted in the early days of English history. See "Cinque Ports," *Encyclopedia Britannica.*

[27] *Jobson's Case* (K.B., 1626), Latch 160, 82 Eng. Reprint 325; *Rex* v. *Pell and Offly* (K.B., 1674), 3 Keble 279, 84 Eng. Reprint 720. The English Counties Palatine (Lancashire, Cheshire, and Durham) were counties in which the earls, or counts, who ruled them in early English history had certain royal powers and prerogatives with exclusive civil and criminal jurisdiction. See "County Palatine," 4 *Encyclopedia of the Laws of England* (3d ed.) 230.

[28] *Rex* v. *Salmon* (K.B. 1669), 2 Keble 450, 84 Eng. Reprint 282; and see *Carus Wilson's Case* (1845), 7 Q.B. 984, 115 Eng. Reprint 759; *In re Frederick Belson* (Privy Council, 1850), 7 Moore 114, 13 Eng. Reprint 823; *Dodd's Case* (Chancery, 1857), 2 DeG. & J. 510, 44 Eng. Reprint 1087.

land,[29] and to Calais when it belonged to England.[30]

In 1759, Lord Mansfield, in a much-quoted *dictum* in *Rex* v. *Cowle* (K.B.), 2 Burr. 834, 855-856, 97 Eng. Reprint 587, 599-600,[31] summarized the places within the territorial reach of the writ of habeas corpus and other prerogative writs at common law as follows:

> Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England.
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> * * * * *
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> To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they

[29] *Anonymus* (K.B., 1681), 1 Ventris 357, 86 Eng. Reprint 230.

[30] See *Richard Bourn's Case*, *supra*, note 26; *Anonymus*, *supra*, note 29; *Rex* v. *Cowle* (K.B., 1759), 2 Burr. 834, 856, 97 Eng. Reprint 587, 600.

[31] The issue in the *Cowle* case was whether the Court of King's Bench had jurisdiction to issue a writ of certiorari to Berwick-upon-Tweed, a town on the English-Scotch border which seems originally to have been part of Scotland and hence exempt from the processes of the English courts. See footnote 25, *supra*, p. 35.

have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny.

2. In his *History of English Law* (vol. 9, p. 116), Holdsworth reports that, prior to the passage of the Habeas Corpus Act of 1679, it was a common abuse for jailers to "move the prisoner about to evade service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." It became evident that legislation was needed "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts," with resulting defeat of habeas corpus jurisdiction, and between 1668 and 1679 there were a number of abortive attempts to pass such legislation. *Id.*, at p. 117. But, significantly, when these efforts finally reached fruition in the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2), the remedy adopted to prevent such illegal imprisonments "beyond the seas" was not expansion of the jurisdiction of the courts so as to place such persons within reach of the courts' processes, but rather the enactment of stringent sanctions, including the conferring of actions in damages for "false imprisonment" upon the prisoners so removed, provision for forfeiture of office by offending jailers, rendering them ineligible for parc n for such offenses, and the like.

Section XI of the Act defined the territorial reach of the writ as follows:

> A habeas corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

Section XII contained the sanctions directed against the removal of prisoners to distant parts. It proscribed the transportation for imprisonment purposes of any "subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed" to "Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors." The section guaranteed to any subject "so imprisoned" an action for "false imprisonment in any of his majesty's courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported," with the right "to recover his treble costs, besides damages, which damages so to be given shall not be less than five hundred pounds." In

addition, it provided that any person who so transported a prisoner-subject, and any one abetting such person, upon conviction, "shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England * * *; shall incur and sustain [certain designated] pains, penalties, and forfeitures * * *; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them."

The severity of the sanctions thus decreed by Parliament for transporting imprisoned British subjects out of England and beyond the seas is legislative recognition that such removals defeated the jurisdiction of the English courts to order production of the bodies of the prisoners thus removed and to inquire into the legality of their imprisonment by habeas corpus. For if the courts' powers were in no way infringed by the device of removal—if they could still inquire into the causes of imprisonment by issuing writs directed to responsible officials of the government residing in England—it is difficult to understand why it was thought so necessary to provide for the punishment of unauthorized removal of prisoners in such vehement terms.

3. Though the 1679 Act cured many of the defects in habeas corpus practice that had led to its enactment, and corrected many of the abuses which had prevailed at common law, it was found to be

by no means a complete answer to the problem of relieving illegal detentions. This was principally because the availability of the writ under the Act was limited to cases in which the detention grew out of "criminal or supposed criminal matters" (Sections I, II, and III), and, even in such cases, commitments "for treason or felony, plainly and especially expressed in the warrant of commitment" could not be inquired into under the writ (Section II). In consequence, the statutory writ could be resorted to only for the limited purpose of testing the legality of commitments for criminal misdemeanors; detentions under civil process and private detentions without any legal process were beyond its scope.[32] See *Carus Wilson's Case*

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[32] The Habeas Corpus Act of 1816 (56 Geo. III, c. 100) dealt with detentions, and remedies therefor, that were private in nature, being pursuant to no legal process whatever, civil or criminal. See *Carus Wilson's Case, supra*, 7 Q.B. at 1009-1010, 115 Eng. Reprint at 770. Section I of the 1816 Act provided that "* * * whereas the Provisions [of the 1679 Act, *supra*] * * * only extend to cases of Commitment or Detainer for criminal or supposed criminal matter; Be it therefore enacted * * * That *where any Person shall be confined or restrained of his or her Liberty* (otherwise than for some criminal or supposed criminal matter, and except Persons imprisoned for Debt or by Process in any civil Suit) *within that Part of Great Britain called England, Dominion of Wales, or Town of Berwick upon Tweed, or the Isles of Jersey, Guernsey, or Man,* * * [*or*] *in Ireland,* [such confined person may apply to certain designated judges for] a Writ of *Habeas Corpus ad subjiciendum* * * * to be directed to the Person or Persons in whose Custody or Power the Party so confined or restrained shall be * * *" [italics added].

The italicized words clearly indicate an intent to limit jurisdiction to issue the writ under this Act to cases where the person detained is physically confined within the designated

(1845), *supra*, 7 Q.B. at 1009-1010, 115 Eng. Reprint at 770. For this reason, the English courts found it continuously necessary, or expedient, even after the passage of the 1679 Act, to invoke their common-law jurisdiction, which was not thus circumscribed. See *Cæsar Wilson's Case*, *supra*, 7 Q. B. at 1009-1010, 1011, 1012, 115 Eng. Reprint at 770; *In the Matter of John Crawford* (1849), 13 Q. B. 613, 625-626, 630, 116 Eng. Reprint 1397, 1402, 1403-1404; *In re Frederick Belson* (Privy Council, 1850), 7 Moore 114, 13 Eng. Reprint 823; *Ex parte Anderson* (Q. B., 1861)), 3 El. & El. 487, 494, 121 Eng. Reprint 525, 527-528.[33] And since the common-law jurisdiction to issue writs of habeas

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areas. This intent is emphasized by Section V of the Act, which provides that "* * * a Writ of Habeas Corpus, according to the true Intent and Meaning of this Act, may be directed and run into any County Palatine or Cinque-Port, or any other privileged Place within that Part of Great Britain called England, Dominion of Wales and Town of Berwick upon Tweed, and the Isles of Jersey, Guernsey and Man, respectively; and also into any Port, Harbour, Road, Creek or Bay upon the Coast of England or Wales, although the same should lie out of the Body of any County; and if such Writ shall issue in Ireland, the same may be directed and run into any Port, Harbour, Road, Creek or Bay, although the same should not be in the Body of any County; * * *."

From the viewpoint of the declared reach of the writ, the 1816 Act is identical with the 1679 Act, except that Ireland and the Isle of Man were added by the later Act to the list of places, as enumerated in the earlier statute, to which the writ might issue. See *supra*, p. 38.

[33] Hence, despite the encomiums which have been heaped upon the 1679 Act, and the fact that it is the prototype of all American habeas corpus statutes (see p. 24, *supra*, and footnote 17), we are told by Lord Halsbury that "The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute" (9 *Laws of England* (2d ed.), p. 707, note (h)).

corpus extended, as we have seen (*supra*, pp. 34-37), to all the King's dominions, the English superior courts in modern times have issued, or considered that they have power to issue, writs of habeas corpus to test the legality of restraints of liberty occurring in any dominion of the Crown, without regard to the particular localities specified in the 1679 Act.[34]

Thus, in 1861, in the celebrated case of *Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Reprint 525, the Court of King's Bench held that it had power to issue a writ of habeas corpus to inquire into the validity of the detention of a British subject in the British province of Upper Canada.[35] The court observed in its opinion (3 El. & El. at 494, 121 Eng. Reprint at 527-528) that—

> * * * in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queen's dominions

[34] Or in the 1816 Act, which dealt with private detentions. See footnote 32, *supra*, pp. 40-41.

[35] Anderson claimed in his petition for the writ that he was imprisoned in Toronto without having been sentenced for or charged with the commission of any offense. The respondents were the sheriffs of York and Brant Counties, the keepers of the Toronto and Brantford (Brant County) jails, and "all other sheriffs, gaolers, and all constables and others in the said province, having the custody or control of the said John Anderson."

> * * * wherever a subject of the Crown is illegally imprisoned or kept in custody.[36]

The *Anderson* decision was, however, promptly nullified as a precedent by the Habeas Corpus Act of 1862 (25 & 26 Vict., c. 20), which provides:[37]

> Sec. 1. No Writ of Habeas Corpus shall issue out of England, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion.
>
> Sec. 2. Provided, That nothing in this Act contained shall affect or interfere with any Right of Appeal to Her Majesty in Council now by Law existing.

Fifty years later, the English courts were confronted with the question, among others, of whether

[36] The court cited as authority for this conclusion various *dicta* of Coke, Lord Mansfield, Blackstone, and Bacon, and "precedents of the issue of the writ, in very modern times, into the Islands of Man, Jersey, and St. Helena." For the circumstances under which a writ of habeas corpus, as ancillary to a writ of error, was, despite grave doubts expressed as to the court's jurisdiction to do so, issued to the Island of St. Helena, see *Ex parte Lees* (K.B., 1860), El. Bl. & El. 828, 120 Eng. Reprint 748, and the remarks of the judges during oral argument on the *Anderson* case with reference to the *Lees* case (3 El. & El. at 492-493, 121 Eng. Reprint at 527).

[37] See the editorial note to the *Anderson* decision in the English Reprint (vol. 121, p. 525), explaining that the 1862 Act was enacted "[i]n consequence of the decision in this case."

the British Protectorate of Bechuanaland, in South Africa, was a "foreign dominion of the Crown, &c.," within the meaning of the above-quoted Act of 1862. *Rex v. Earl of Crewe* (Court of Appeal), [1910] 2 K. B. 576, 102 Law Times Rep. 760. The applicant for the writ was Sekgome Letsholathibe, a pretender to the chieftainship of the Batawana tribe in the Bechuanaland Protectorate. The respondent, the Earl of Crewe, was the British Secretary of State for the Colonies. In order to prevent the outbreak of tribal warfare between the supporters and the opponents of Sekgome's claims to the tribal chieftainship, Sekgome was confined under the authority of a proclamation of the British High Commissioner in Bechuanaland.[38] The King's Bench Division of the High Court of Justice (Lord Alverstone, C. J., and Ridley and Darling, JJ.) discharged a rule to show cause why the writ should not issue, on the grounds (1) that the Bechuanaland Protectorate was a "foreign dominion of the Crown, &c." within the meaning of the 1862 Act, *supra*, forbidding issuance of the writ out of England into any such dominion, and (2) that in any event Lord Crewe, the Colonial Secretary, was not a proper respondent since he did not have custody or control of Sekgome; no

[38] The High Commissioner had issued his proclamation under the authority of an Order in Council, which in turn rested on the authority of the Foreign Jurisdiction Act of 1890 (53 & 54 Vict., c. 37). The merits of the controversy whether or not the proclamation was valid have no relevance here.

opinion was expressed as to the validity of the High Commissioner's proclamation under which Sekgome was imprisoned (102 Law Times Rep. at 766-770).

On appeal by Sekgome to the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L. JJ.), the appeal was dismissed. The principal ground of dismissal was the Court of Appeal's conclusion that the High Commissioner's proclamation (and, consequently Sekgome's confinement) was valid—this being the issue on the merits which the King's Bench Division had refrained from deciding (*id.* at 770-784). Kennedy, L. J., however, also expressly concurred in the lower court's view that "the Secretary of State for the Colonies is not a person to whom such a writ can properly be directed," and stated that the writ should have been directed either to the actual custodian or to the latter's immediate "administrative superior," *i. e.*, the High Commissioner (*id.* at 784).[39] Lord Justice Kennedy further expressed the conviction that no English court had, in any event, jurisdiction to issue a writ of habeas corpus under the cir-

[39] Vaughan Williams, L. J. was likewise "inclined to think" that the writ "could not be properly addressed to the Secretary of State" (though he found it unnecessary, he said, to decide the point), and agreed that it should more properly have been directed either to the actual jailer or to his immediate superior (the High Commissioner), or to both (*id.* at 772). Farwell, L. J. stated that he "should be slow to conclude" that the Colonial Secretary was not a proper respondent, but likewise found it unnecessary to decide the point (*id.* at 780).

cumstances of that case because the Bechuanaland Protectorate, where the prisoner was confined, was "foreign territory," and not a "foreign dominion" of the King. His views in this respect are particularly pertinent to the issue in the case at bar. He said (*id.* at 782-783):

> * * * par[agraph] 4 [of Lord Crewe's affidavit in opposition to the issuance of the writ] runs thus: "The Bechuanaland Protectorate is a foreign country within which His Majesty has power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means within the meaning of the Foreign Jurisdiction Act 1890. The territory of the said protectorate is foreign territory under His Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by His Majesty or any of his royal predecessors, nor has His Majesty or any of his royal predecessors recognized the same as nor is it part of his dominions, but he has power and jurisdiction within the same." *If this be the true view, as, in my opinion, we ought to hold, and the Bechuanaland Protectorate * * * forms no part of His Majesty's dominions, there is no authority, so far as I am aware, which would justify the issue of the writ of habeas corpus for which the appellant asks.* [Italics added.]

These views provide persuasive support, we think, for the Government's contention in the case at bar. There would seem to be a clear analogy between

the British Protectorate of Bechuanaland in 1910 and its relationship to the British Government, on the one hand, and the American occupation zone in present-day Germany and its relationship to the United States Government, on the other. Just as Bechuanaland was "foreign territory," though "under His Majesty's protection," so the American occupation zone in Germany is "foreign territory," though under American protection. Cf. *Neely* v. *Henkel*, 180 U. S. 109, 115-119 (American-occupied Cuba held a "foreign country or territory"); and see Fairman, *Some New Problems of the Constitution Following the Flag* (1949) 1 Stanford L. Rev. 587, 624-626. See *infra*, pp. 65-66, 75-77. And the analogy between the British Colonial Secretary's relationship to the prisoner Sekgome and the Secretary of Defense's relationship to the respondents in the instant case is equally apparent. See *infra*, pp. 50-53. For the same reasons, therefore, which led Lord Justice Kennedy, of the English Court of Appeal, to conclude that there was a lack of power in the King's Bench Division of the High Court to inquire by habeas corpus into the legality of Sekgome's detention in foreign territory (though at the hands of British officials acting under British authority), we submit that the District Court for the District of Columbia properly determined in this case that it lacked power to inquire by habeas corpus into the legality of respondents' detention in foreign territory.

A more recent English decision having relevance to the issue at bar is that of *In re Ning Yi-Ching and Others* (Vacation Court, 1939), 56 Times Law Rep. 3. There, four Chinese aliens, detained by British authorities in Tientsin, China, applied to Judge Cassels in Vacation Court for a writ of habeas corpus, directed to the British Foreign Secretary (Lord Halifax), the British Consul-General in Tientsin, and other British officials in that city, to inquire into the validity of their detention. Britain at that time exercised certain rights of administration and control in Tientsin by virtue of a lease which it had acquired by treaty with China. The Chinese prisoners were held on charges of certain criminal offenses, and the British authorities had evidenced the intention of surrendering them to the Tientsin District Court (a Chinese court), which the applicants for the writ alleged was then in control of the Japanese, who were engaged in military operations in the vicinity. It was held, however, that the writ of habeas corpus could not be directed to run into foreign territory to test the legality of the restraint of an alien there detained, even though the detention was by British authority. Though eminent counsel appeared in the case on behalf of the Chinese prisoners, the reporter noted that Judge Cassels "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not part of the King's

dominions or realm" (56 Times Law Rep. at 6). It was further held that, in any event, the prayed-for writ could not be directed to the British Foreign Secretary "because he was not in control of the prisoners but was only acting in an advisory capacity" (*ibid.*). The *Ning Yi-Ching* case thus provides further modern English support for the Government's contention in the case at bar.[40]

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[40] Two celebrated English cases that arose towards the end of the last century involved writs of habeas corpus directed to the head of an institution for destitute children, one Barnardo, requiring him to produce two children who had been committed to his care, and whom he had without authority delivered to strangers for adoption. *Barnardo* v. *Ford* [*Gossage's Case*] (House of Lords), [1892] A. C. 326, dismissing appeal from *The Queen* v. *Barnardo* [*Gossage's Case*] (Court of Appeal, 1890), 24 Q.B.D. 283; *The Queen* v. *Barnardo* [*Tye's Case*] (Court of Appeal, 1889), 23 Q.B.D. 305. In both cases, Barnardo had delivered the children prior to the issuance of the writs, and, as grounds for his prayer that the writs be quashed, he claimed that he no longer had custody or power of control over the children, and, in fact, that he had no knowledge of their whereabouts, other than that the would-be adopters intended to take them out of England to Canada. In both cases, the final decision was that Barnardo was required to make return to the writs so that all relevant facts could be thoroughly ascertained. The judges of the Court of Appeal and the House of Lords expressed divergent views in lengthy opinions, but their differences revolved around the question of whether the writs would lie if it was established that the respondent had in fact no power of control over the children at the time of the applications for the writs and their issuance. The judges of the Court of Appeal thought the writs would lie even in that event, unless it appeared that it would be absolutely impossible for Barnardo to locate, recover, and produce the children. A majority of the judges in the House of Lords disapproved this extreme view, stating that the writs would not lie if Barnardo could satisfactorily prove on his returns to the writs that he no longer had control over the children at the time the writs issued. However, the question of whether or not the writs would lie if the children, though subject to the respondent's control, were beyond the

II

A Writ of Habeas Corpus Cannot Properly Issue to Petitioners, Who Do Not Have Actual Physical Custody of the Respondents

A. Intertwined, of course, with the question of the jurisdiction of the district court in the case of applicants not detained within the court's territorial confines is the problem of whether governmental officials who have ultimate directive authority over the immediate jailer, as distinguished from actual physical custody, are proper respondents. The statute (28 U. S. C. 2243) provides that the writ "shall be directed to the person having custody of the person detained". In respect of a substantially similar provision in a predecessor statute (Rev. Stats. 754-758), this Court stated that Congress contemplated "a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U. S. 564,

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territorial jurisdiction of the court was not considered in either case, the point not having been raised.

We think, however, for reasons previously stated (see pp. 31-32, *supra*), that, whatever might have been the views of the English judges on this question had it been raised, they would have little relevance here, since the *Barnardo* cases involved questions relating to the custody of minor children, who, though nominal parties in habeas corpus proceedings arising from such controversies, are not the true parties in interest—a factor distingishing such cases from the ordinary habeas corpus proceeding in which the applicant for the writ is, in a real sense, restrained of his liberty. See *Rivers* v. *Mitchell*, 57 Iowa 193, 195, quoted *supra* at p. 32.

574. Certainly, the Secretary of Defense, the Secretary of the Army, and the other officials who were named respondents in no sense have "immediate" or "actual physical" custody of the prisoners, and, under such decisions as *McGowan* v. *Moody*, 22 App. D. C. 148, 163; *Jones* v. *Biddle*, 131 F. 2d 853 (C. A. 8), certiorari denied, 318 U. S. 784; and *Sanders* v. *Bennett*, 148 F. 2d 19 (C. A. D. C.), they were improperly named respondents. (See also the views of the judges of the English courts in *Rex* v. *Earl of Crewe*, [1910] 2 K. B. 576, discussed *supra*, pp. 44-45, and footnote 39, p. 45). Although these officials may have power to effectuate a mandate which the district court might issue for the release of the prisoners, that practical consideration (which is always present when the jailer is a government official responsible to a superior official resident in the District of Columbia) does not dispel our doubts that Congress intended the writ to be issued to them. To construe the statute as permitting the habeas corpus court to direct persons without actual custody of the prisoner to produce him would be to contradict the common understanding and to disavow the traditional scope of the writ's reach.

Furthermore, once there is a departure from the accepted rule that habeas corpus must be brought against those with actual custody of the prisoner, the door is opened to suits against any superior of the actual custodian, all the way up the "chain of command"—even, perhaps, including the Presi-

dent, who is Commander-in-Chief of all military forces and the country's sole organ in the field of foreign relations. *McGowan* v. *Moody, supra,* pointed out, with respect to the Secretary of the Navy, that "The officers of the Navy are not his agents. They, like the Secretary himself, are the agents and representatives of the President of the United States, who is the Commander-in-Chief of the Army and Navy. The officers in command of the island of Guam are subject to his orders. Any authority which the Secretary may exercise over them is solely as the representative of the President, in his name, and as the organ of his will. * * * The power to relieve the prisoner, or to produce him in obedience to the writ, is in the President, and not in the Secretary of the Navy." 22 App. D.C., at 164. Thus, the consequences of abandoning the established rule are both uncharted and potentially grave, and no adequate substitute for suit against the actual custodian has been proposed.

In this connection, the recent establishment in Germany of a High Commission in lieu of the former Military Government (and the transfer of supervision from the Defense to the State Department) also has a significant impact. We do not contend, in this Court, that this change renders the present action moot, or requires new parties. But the transfer does illustrate some of the difficulties in permitting officials such as petitioners to be named as parties respondent in habeas corpus, instead of the actual custodian. In the area of for-

eign affairs, especially where military and civil officials are operating together, lines of authority and chains of command may be hard to unravel—short of the President. Also, changes in high governmental policy, or in the administration of an overseas region, may shift responsibilities of officials at the seat of government, and compel changes in defendants or the institution of an entirely new action. On the other hand, adherence to the established rule involves none of these embarrassments; the writ is directed to the person who holds the prisoner in his immediate custody and neither court nor respondent is concerned with chains of command or reallocations of ultimate responsibility.

B. It may be that this objection is one which can be waived (cf. *Ex parte Endo*, 323 U. S. 283, 305; *Ahrens* v. *Clark*, 335 U. S. 188, 193), but, if so, there has been no waiver here. The return to the rule to show cause denied that petitioners have had custody or keeping of respondents (R. 9); and in the Court of Appeals it was again urged that petitioners are not proper respondents because they do not have actual physical custody of the respondents (Brief for Appellees in the Court of Appeals, pp. 5-6).

III

The Burden Falling on the District Court for the District of Columbia Under the Decision Below Would Be So Great That It Is Highly Improbable That Congress Ever Contemplated That That Court Should Be the Forum, and Exclusive Forum, to Try Habeas Corpus Proceedings of This Type

Under the decision below, the District Court for the District of Columbia is the proper forum for

the trial of habeas corpus proceedings emanating from any place in the world beyond the territorial confines of all federal district courts, provided the applicant for the writ is detained by American officials purporting to act in their official capacities, and makes a showing or an allegation that his detention is somehow in violation of the Constitution, or is otherwise illegal. The decision moreover holds that that court is the *only* proper forum, since that court alone has within reach of its processes those highest officers of this Government having ultimate administrative control over the lower-ranking officials who are the applicant's immediate jailers. Upon the local District Court, under this decision, must fall the task of entertaining, considering, and passing upon every such application, however lacking in merit it may finally prove to be, so long as it contains the requisite allegation of unlawful detention by an American official in foreign territory. The status of the applicant—whether he be citizen or alien, friend or foe—is immaterial. For the reasons which follow, it is submitted that the duty which would thus devolve upon the local District Court under the decision here sought to be reversed would constitute a burden so great that it is highly improbable that Congress ever contemplated such a result.

The extraordinary nature of the burden that would fall on the local District Court under the decision below is suggested by the fact that nearly

400,000 cases were tried by American Military Government Courts *alone* in the American occupation zone of Germany *alone* between September 1945 and August 1948. Noblgman, *American Military Government Courts in Germany* (1950), 267 Annals of Amer. Acad. of Pol. and Soc. Sci. 87, 95. Since that time, military government courts, or their analogues (now referred to as the courts of the High Commission), have continued to operate in Germany, as part of the control program demanded by the occupation of that enemy country.[41] When it is remembered that the above-cited figure takes no account of similar cases in Japan, or of cases before other types of American-manned tribunals (military commissions, courts-martial, etc.) in these and other countries, it is evident that the total number of applications for writs of habeas corpus which might be filed in the District Court for the District of Columbia on behalf of citizens and aliens confined abroad by American military

[41] For other relevant statistics, descriptions of the structure and jurisdiction of these military government tribunals, and for discussions of various aspects of the vast and complicated task confronting our Military Government Courts in the American occupation zone of Germany, see, in addition to the article cited, the following articles by the same author: *Military Government Courts: Law and Justice in the American Zone of Germany* (1947) 33 Am. Bar Assoc. Journ. 777; *The Administration of Justice in the United States Zone of Germany* (Oct. 1946), 8 Fed. Bar Journ. 70; *Procedure and Evidence in American Military Government Courts in the United States Zone of Germany* (Jan. 1947), 8 *id.* 212; see also Fairman *Some New Problems of the Constitution Following the Flag* (1949), 1 Stanford L. Rev. 587, 606-611, 616-618.

or civilian authorities,[41a] and which that court would be required to entertain and pass upon under the decision below, is potentially enormous.[42]

Many, if not most, of these applications could be expected to present difficult problems of jurisdiction and possibly delicate questions of international

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[41a] Approximately, 8,000 persons are detained at the present time in American-occupied Germany, Austria, and Japan, as a result of convictions by courts-martial, military commissions, war crimes tribunals, and American-manned occupation courts. Of these, about 2500 are Americans (mostly military personnel convicted by courts-martial and given relatively short sentences; see fn. 57, *infra*, p. 75); the remainder are enemy aliens and other non-Americans.

[42] A further indication of the enormity of the task that would confront the local District Court if the decision below is sustained is the fact that in the 16-month period between January 1948 and May 1949 motions for leave to file original petitions for writs of habeas corpus were filed in this Court on behalf of over two hundred German enemy aliens alone, confined abroad by American military authorities. *Brandt* v. *United States*, and 13 companion cases, 333 U. S. 836; *In re Eichel* [one petition on behalf of three persons], 333 U. S. 865; *Everett* v. *Truman* [one petition on behalf of 74 persons], 334 U. S. 824; *In re Krautwurst*, and 11 companion cases, 334 U. S. 826; *In re Ehlen "et. al.,"* and *In re Girke "et al.,"* 334 U. S. 826; *In re Gronwald "et al.,"* 334 U. S. 857; *In re Stattman*, and 3 companion cases, 335 U. S. 805; *In re Vetter*, and 6 companion cases, 335 U. S. 841; *In re Eckstein*, 335 U. S. 851; *In re Heim*, 335 U. S. 856; *In re Dammann*, and 4 companion cases, 336 U. S. 922-923; *In re Muhlhauer*, and 57 companion cases, covering at least 80 persons, 336 U. S. 964-965. See Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stanford L. Rev. 587, 594-603, for a discussion of these cases. It would be reasonable to expect, of course, that if the decision below is upheld the floodgates would be opened wide and that what has so far been a trickle would develop into a torrent. Cf. *Dorsey* v. *Gill*, 148 F. 2d 857, 862 (C.A. D. C.), certiorari denied, 325 U. S. 890, where it was observed that "The number [of habeas corpus petitions filed in the District of Columbia] has increased most rapidly during the last three years, since the Supreme Court's decision in *Walker* v. *Johnston* * * *."

law and foreign affairs.[43] Many, drawn by inexpert hands, would be lacking in conciseness as well as appreciation of the sort of alleged error that is subject to review on habeas corpus.[44] Yet all would have to be read and processed patiently and conscientiously if the right to be heard by the local court were to be other than illusory. Some could be expected to be so lacking in merit on their face as to be deniable without further proceedings (other than appellate), but time would be required to read even these in order to ascertain that fact. Many more, doubtless, would sufficiently present a *prima facie* case calling for the writ's issuance as to require the issuance of a show-cause order, to which a return would be required, followed by a hearing on issues thus joined. In many of the

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[43] Cf. this very case (see p. 5, and footnote 4, *supra*), which there is no reason to suppose is unique or atypical.

[44] See Fairman, *op cit. supra* (notes 41-42), 1 Stanford L. Rev. 587, 603, where, in describing some of the habeas corpus petitions filed in this Court in recent terms by German aliens detained abroad, it was said:

"One can scarcely hope to put in brief compass any adequate summary of the many sorts of contentions set out in these thousands of pages. One defense counsel sent to the Court an 'opinion on the verdict' covering 104 typed pages in the translation. • • • Many of the documents run on and on without form or headings • • • Many pages devoted to the petitioner's version of factual details must remain quite incomprehensible apart from the record of the trial. As one might expect, contentions of want of jurisdiction, appeals for a new trial, assignment of error in law, and pleas for clemency are often mixed together in the applications • • • A conception that runs throughout is neatly expressed in the form of address used by one applicant: 'To the Supreme Federal Court of Justice (War Crimes Department) Washington.' • • •"

cases, the jurisdictional issues raised could not be settled without the applicants' presence at hearings to give testimony and be cross-examined. This would necessitate the transportation—over thousands of miles, oftentimes from the remotest outposts of the earth—not only of the prisoner-petitioners, but also of such persons having knowledge of disputed facts as would be required to refute baseless claims and charges that might be expected from prisoners who believed they had little to lose by the adoption of such tactics.

It is submitted that the task that would confront the local District Court under the decision below would be so formidable that Congress cannot be supposed, in the absence of statutory language of the clearest character, ever to have contemplated such a result. It is well known that the docket of the District Court is already, and has long been, clogged with domestic habeas corpus cases. See *Dorsey* v. *Gill, supra* (note 42) 148 F. 2d at 862-864. The added burden that would devolve upon that court if the decision below is sustained would clearly be immense. If it be thought that the validity of the confinement of every person—alien as well as citizen—detained by American officials in foreign lands should be subject to judicial inquiry by writ of habeas corpus, legislation equitably distributing the burden of entertaining petitions for such writs among the different judicial districts

of the United States, or setting up special courts for this purpose, is the answer to the problem."[45]

IV

Alien Enemies Confined Abroad Are Not Entitled by the Constitution to the Writ of Habeas Corpus, and There Is Therefore No Occasion to Construe the Habeas Corpus Statutes as Conferring Upon the District Court for the District of Columbia Jurisdiction to Inquire into the Legality of Their Detention

The court below stated that the answer to the question at bar—whether the District Court for the District of Columbia has jurisdiction to issue a writ of habeas corpus to inquire into the legality of the detention, by American officials, of enemy aliens confined on foreign soil—could not be determined by "casual reference to statutes or cases," but rather "stem[med] directly from fundamentals" (R. 55). The "fundamentals" which the court thought dictated an affirmative answer to this question may be briefly summarized as follows (see R. 55-61):

(1) "[A]ny person," said the court, whether he be citizen or alien, and wherever he may be, "who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confine-

[45] This is the conclusion reached in Wolfson, *Americans Abroad and Habeas Corpus* (Jan. 1948), 9 Fed. Bar Journ. 142, 146-149, which considers the problem solely in connection with *citizens* detained abroad. See pp. 150-152 of the article cited for the provisions of a proposed statute.

ment is in violation of a prohibition of the Constitution, has a right to the writ [of habeas corpus]" (R. 55). This followed, the court thought, from the following premises (R. 55-56): (a) The Fifth Amendment applies to "every person"; (b) action of government officials in violation of the Constitution is void; (c) a basic function of the judicial branch of a government built upon a constitution is to set aside void action by government officials—"* * * no Government action," to use the language of the court, "which is void under the Constitution is exempt from judicial power"; and (d) the writ of habeas corpus is "the established, time-honored process in our law for testing the authority of one who deprives another of his liberty."

(2) "[I]f a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute" (R. 58-59). This followed, said the court, from the following premises (R. 59-60): (a) The right to habeas corpus is an "inherent common law right"; (b) "The Federal Government cannot suspend the privilege, except when, in cases of rebellion or invasion, the public safety may so require [citing Article I, § 9, cl. 2 of the Constitution, set out at p. 2, *supra*]; and (c) "Congress could not effectuate by omission that which it could not accomplish by affirmative action. So, if the existing jurisdictional act be construed to deny the writ to a person

entitled to it as a substantive right, the act would be unconstitutional."

And since, the court concluded, a person unlawfully detained abroad by American authorities has "a right to the writ," of which he "cannot be deprived * * * by an omission in a federal jurisdictional statute," his petition for the writ "will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer" (R. 60), to wit, the District Court for the District of Columbia.

We submit, however, that the most basic of the above-listed premises, upon which the court below erected its conclusion, are far too doubtful to be capable of supporting its elaborate reasoning.

First. Granting, as the court said, that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow that a *judicial* remedy—habeas corpus where the offending official's acts have the effect of restraining personal liberty—is available to contest that action. The court's most fundamental assumption—that "[i]n our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power" (R. 56)—is certainly far from a universal proposition, admitting of no exceptions. Abundant exceptions come to mind, particularly in the realm of foreign affairs and the conduct of war,

in which the Executive is the primary and often the sole guardian of the Constitution. As this Court observed in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542-3; *Ludecke* v. *Watkins*, 335 U. S. 160, 169-173; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111-112; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321.

An enemy alien held abroad may be detained because he is believed to be a war criminal, or because he is charged with an offense against the occupying forces or the rules established for the occupation and governance of his country, or because he is interfering with some phase of the prosecution of the war to a successful conclusion. But whatever the reason the American authorities overseas may have for confining him, they are acting—whether they be military or civilian officials—as the delegates and deputies of the President in the conduct, on foreign soil, of this nation's foreign affairs and the carrying-on of a foreign war. The President's authority in those spheres is an executive power for which he is normally "responsible to the Constitution" (*United States* v. *Curtiss-*

Wright Corp., 299 U. S., at 319), and not to the courts. His deputies, in turn, are responsible to him for violations of their rightful authority. And by the same principle, the detained alien must seek redress for his invaded rights through the executive and administrative machinery instituted for that purpose, as well as through the good offices of his own country's government.

Second. Equally doubtful, we think, is the view of the court below that the habeas corpus statutes —if interpreted as not vesting power in any federal district court to issue writs of habeas corpus where the alien-enemy applicants are detained beyond the territorial jurisdiction of all district courts—would violate the constitutional prohibition against suspending the privilege of the writ except when required by the public safety in cases of rebellion or invasion. We argue below (*infra*, pp. 71-77) that this clause of the Constitution does not require Congress to make habeas corpus available to American citizens held in a foreign land. Whether that be so or not, we do not believe that the provision touches the case of non-citizens detained abroad, particularly enemy aliens. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we gravely doubt that the Constitution's draftsmen contemplated it as a method of setting aside, through the intervention of our domestic courts, all *ultra vires* actions by government officials, military or civil, any place in the

world, even though such actions might affect only aliens or enemy aliens. The amplitude of the writ, as referred to in the Constitution, is probably no greater than it was at common law or under the English statutes at the time the Constitution was adopted (*supra*, pp. 33-34). And we have found no authority for the proposition that the writ was then available on behalf of aliens confined in a foreign country. On the contrary, such authority as exists points the other way. (See *supra*, pp. 34-49.) The Habeas Corpus Act of 1679 limited its sanctions against removal of prisoners to foreign lands to "any person or persons, *subjects of this realm*". Secs. IX, XI, XIII (italics supplied). Even alien enemies held on English soil were held "not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Case of Three Spanish Sailors* (K. B. 1779), 2 Black. W. 1324, 96 Eng. Reprint 775, 776; cf. *Rex* v. *Schiever, a Swede* (K. B., 1759), 2 Burr. 765, 97 Eng. Reprint 551. And as late as 1939 there was no record in England of a case in which the writ had issued with respect to a friendly alien detained by British authority in a part of the world which was not part of the King's dominions or realm. See report of *In re Ning Yi-Ching*, 56 The Times Law Reports 3, 6 (*supra*, pp. 48-49).[46]

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[46] Even as to American citizens, *Neely* v. *Henkel*, 180 U. S. 109, 122, indicates that "the provisions of the Federal Constitution relating to the writ of *habeas corpus*" would not apply

Third. There is, moreover, no basis for holding that enemy aliens located and held in enemy territory have any substantive rights under our Constitution or laws which may be prosecuted through the writ of habeas corpus.[47] The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country, and they cannot properly call upon the protections and rights stemming from our domestic or internal law, unless Congress has expressly granted such rights to them. They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation.

An occupying power has the sanction of the law of nations to exercise governmental powers, to promulgate regulations, and to grant rights to the inhabitants. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393-394; *Dooley* v. *United States*, 182 U. S. 222, 230-231; *Neely* v. *Henkel*, 180 U. S. 109; *MacLeod* v. *United States*, 229 U. S. 416, 424-425. As a member of the family of nations, the United States, in its capacity as an occupying power, has this authority to its fullest extent. *United States* v. *Curtiss-*

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where the prisoner was held in American-occupied foreign territory. See *infra*, pp. 75-76.

[47] "The writ need not * * * be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison." *Ex parte Terry*, 128 U. S. 289, 301. See 28 U.S.C. 2243.

Wright Corp., 299 U. S. 304, 318. But the occupied country remains foreign territory and "cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U. S. 109, 119 (American military occupation of Cuba after the War with Spain). Similarly, the laws governing the residents of the occupied lands, and the rights accorded them by the occupying power, do not stem from the Constitution, for "the Constitution can have no operation in another country." *In re Ross*, 140 U. S. 453, 464. "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens * * *" *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. On the contrary, the occupying power's rules and regulations are "the laws of a foreign country" (*Neely* v. *Henkel*, 180 U. S. 109, 122) currently promulgated for that country by its occupier, and action taken by American officials in the enemy-occupied country is "without the jurisdiction of the United States" (180 U. S., at 122). It must follow, we think, that enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and likewise cannot lay claim to rights under our law. Respondents' legal status does not differ from that of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them.

under their country's present laws and government.

Congress and the President, in carrying on activities abroad, may possess no power not derived from the Constitution and may always be subject to its applicable provisions (*Ex parte Quirin*, 317 U. S. 1, 25; cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318), but it does not follow that all persons affected by their action possess rights under the Constitution, violations of which they can redress. The source of governmental authority and the right to challenge unauthorized action are separate and distinct. It is our position that, in cases such as this, non-resident alien enemies have no rights under American law, even though American officials must act under and in accordance with that law.[48]

Congress may have indicated by its legislation an intention to grant certain rights under American law to enemy aliens found on American soil (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1, 9;[49] *Ludecke* v. *Watkins*, 335 U. S. 160; cf. *Ex parte Kawato*, 317 U. S. 69, esp. pp. 76-7); but this exceptional legislative solicitude should not serve as a point of departure to accord, without comparable legislative sanction, similar substantive

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[48] See *infra*, pp. 73-77, for further discussion of the extraterritorial application of the Constitution and its guarantees.

[49] At the time Generals Yamashita and Homma were tried, convicted, and held, the Philippine Islands were under American sovereignty (327 U. S., at 9-10), and the writ of certiorari could run from this Court to the Supreme Court of the Philippines.

rights under American law to enemy aliens living abroad to whom Congress has not been so generous. And there is no ground for straining to read any Congressional enactment as conferring such extra-territorial rights or privileges. On the contrary, we believe the Court should refrain from holding that such rights have been extended to non-resident alien enemies unless there is the clearest evidence that Congress (or, perhaps, the Executive) so intended. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. We may add that it is highly unlikely that Congress would make available the procedural remedy of habeas corpus to alien enemies without any substantive rights to be vindicated by the writ.[50]

Fourth. Although the Court of Appeals thought that it could not distinguish between citizens and non-resident aliens (R. 58), we do not believe that this Court must necessarily reach the question of whether the writ is, and must be, available to citizens of the United States detained in a foreign country by American officials (cf. *Ex parte Betz*, and companion cases, 329 U. S. 672; *In re Bush*, 336 U. S. 971; *Bird* v. *Johnson*, 336 U. S. 950), and, if so, in what court it would lie. The distinctions have already been suggested in this Point.

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[50] On the right of non-resident alien enemies to sue in our courts—as distinguished from the source of their substantive rights or claims—see *Ex parte Colonna*, 314 U. S. 510; *Ex parte Kawato*, 317 U. S. 69; Gordon, *The Right of Alien Enemies to Sue in American Courts*, (1942) 36 Ill. L. Rev. 809, 810-811; Note: (1918) 31 Harv. L. Rev. 470.

For one thing, the right of citizens to have the writ issue on their behalf—so long, at least, as they are confined in a place which is actually subject to the control or dominion of the Government—may possibly have obtained at common law (cf. *Ex parte Anderson,* 3 El. and El. 487, 491 (Q.B., 1861) (*supra,* pp. 42-43)), and thus have been a part of the concept of habeas corpus which was carried over into the Constitution and the statutes. Certainly, Englishmen enjoyed a much higher status under the pre-Constitution English law of habeas corpus than aliens, and particularly enemy aliens. See *supra,* p. 64.[51]

Another difference, as we have suggested (*supra,* pp. 65-68), is that American citizens have substantive rights under American law which can be pressed by means of the writ, while enemy aliens living abroad have none. And in any event, it would not be antithetic to the Constitution or our history to hold that while our fundamental law may implicitly grant to American citizens a universal right of freedom from unlawful detention by Americans, it gives only a territorially limited right to aliens, whose rights in many other respects are not on a par with those of citizens. Cf. *Hines* v. *Davidowitz,* 312 U.S. 52, 69-74; *Ng Fung Ho* v. *White,*

[51] In *Re Sun-Yat* (1896), unreported, cited in Short and Mellor, *Crown Practice* (2d. ed. 1908), p. 318, and in 9 Halsbury's *Laws of England* (2d ed.), p. 710, note (t), an English court refused to issue the writ at the behest of a Chinese national (later the first President of the Chinese Republic) detained within the Chinese embassy in London.

259 U. S. 276, 284-285; *Knauff* v. *Shaughnessy*, 338 U. S. 537. Even though non-resident enemy aliens such as respondents are held to possess rights under the Constitution and laws, they can properly be required to pursue those rights through executive and administrative channels, rather than through the district courts. *Supra*, pp. 61-63.[52]

Conclusion. For present purposes, it is enough to say that Congress is not required by any specific mandate of the Constitution, or any vague emanation therefrom (cf. *Ludecke* v. *Watkins*, 335 U. S. 160, 171), to give habeas corpus rights to alien enemies outside the country. Whether, and on what conditions, Congress should extend the same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance from this country of the foreign places of confinement, the availability of witnesses and their amenability to the processes of our courts, the expenses of transportation, the number of potential applicants for the writ, the classes of detained enemy aliens, and the extent of judicial review available abroad (see pp. 54-59, *supra*), as well as upon our agreements with other powers, the need for expedition and finality in the execution of our international undertakings in punishing war criminals, and the policy

[52] It is settled, under the existing habeas corpus statutes, that enemy aliens detained *within* the territory of the United States may resort to the district courts for writs. *Ex parte Quirin*, 317 U.S. 1; *Ludecke* v. *Watkins*, 335 U.S. 160. See *supra*, pp. 67-68.

demands of the occupation of enemy areas. Other factors to be weighed are whether the remedy shall be available at all times, even during the height of hostilities on foreign soil; the stage at which relief should be allowed, *e.g.*, before or after trial; whether special time and procedural provisions are appropriate; and the scope of review to be afforded in our domestic courts. Lastly, as we have previously suggested (*supra*, pp. 58-59, and footnote 23, p. 31), it would unquestionably be desirable, in the event Congress legislates on the matter, to distribute among several district courts the task of considering petitions for habeas corpus coming from aliens detained abroad. But these are all matters for legislative consideration—unfettered by the view of the constitutional requirement on which the decision below is based.

V

The Constitution Does Not of Its Own Force Entitle Any Person, Citizen or Alien, to the Writ of Habeas Corpus to Test the Legality of His Detention Abroad by American Officials

In Point IV (pp. 68-70), we have argued that the Court need not pass upon the constitutional right of an American detained abroad to the writ. But since the Court of Appeals did not believe that a difference could be drawn between the case of a citizen and that of a non-resident enemy alien (R. 58), it also seems appropriate to sketch the reasons for believing that the constitutional prohibition against suspension of the writ does not compel

habeas corpus to be made available to citizens held overseas by American officials.[53]

1. The wording of Article I, Section 9, Clause 2,[54] strongly implies that the protected privilege was solely that known to English and colonial practice before the Revolution. For a privilege or right cannot be "suspended" unless it already has existence, and this language itself shows that the framers were intent on preserving the writ as they knew it, rather than on enlarging its coverage. Cf. *Ex parte Watkins,* 3 Pet. 193, 201. And, as we have pointed out (*supra,* pp. 33-42), the pre-Revolutionary history of habeas corpus in England hardly can be cited in support of the view that the writ would run to English officials imprisoning English subjects on non-English soil. In particular, the framework and provisions of the Habeas Corpus Act of 1679—with its special sanctions against removal of prisoners to foreign parts—are very difficult to harmonize with the claimed extra-territorial reach of the writ under the old English practice. *Supra,* pp. 37-39. Unless this preexisting universal scope can be shown, the Constitutional provision would seem to exert no compulsion on the Congress to extend habeas corpus to persons detained abroad,

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[53] We have already argued that, constitutional considerations aside, the habeas corpus statutes do not extend the writ to any person detained abroad. *Supra,* pp. 15-49, 53-59.

[54] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

and the courts have no authority to supply the omission.

2. It is a part of our legal tradition, moreover, that "By the Constitution a government is ordained and established 'for the United States of America' and not for countries outside of their limits. * * * The Constitution can have no operation in another country." *In re Ross,* 140 U. S. 453, 464. The Court there decided that the Fifth and Sixth Amendments' guarantees of jury trial and grand jury indictment were inapplicable to an American citizen charged with committing a crime in Japanese territorial waters and convicted by an American consular court sitting in Yokohoma. "The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States." 140 U. S. at 464. Conversely, the Court held, the law which determines the rights of citizens affected by the extraterritorial action of American officials overseas—such as consular courts—is not the Constitution. "When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two

countries may agree, the laws of neither one being obligatory upon the other." 140 U. S., at 464.[55]

It is consonant with these postulates—that the "Constitution can have no operation in another country," and that our officials exercising authority abroad are not subject to the particular prohibitions and directions of the Constitution[56]—to read the constitutional prohibition against suspension of habeas corpus as applying only where the restraint of liberty occurs on American soil. Just

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[55] "The Constitution and the laws of the United States, made in pursuance of it and treaties made under its authority, are to be the supreme law of the land; but not of any other land, nor for American citizens living in any other land." Letter on judicial extraterritorial rights from Secretary of State Frelinghuysen to the Chairman of the Senate Committee on Foreign Relations, April 29, 1882, Sen. Misc. Doc. No. 89, 47th Cong., 1st Sess., p. 14 (cited in the *Ross* case, 140 U. S. at 465).

For the history and practice of American consular courts and similar extraterritorial tribunals, see (in addition to *In re Ross, supra*), Secretary Frelinghuysen's letter, *supra*; 7 Op. Atty. Gen. 495; *In re Joseph Stupp*, 11 Blatch. 124, 145-149 (C. C. 2); *Casement* v. *Squier*, 46 F. Supp. 296 (W. D. Wash.), affirmed, 138 F. 2d 909 (C. A. 9); Note, *The United States Court for China* (1936), 49 Harv. L. Rev. 793; 2 Moore, *Digest of International Law* (1906), secs. 262-290; 2 Hackworth, *Digest of International Law* (1941), secs. 177-190.

[56] We do not mean to suggest that American officials on foreign missions receive their authority from a source independent of the Constitution, but only that they are not required to conform to the particular provisions intended to apply only within this country. See *supra*, p. 67. A parallel, but stricter, doctrine is imbedded in the decisions of this Court that while the Constitution governs our relations with unincorporated American territory or possessions, certain particular provisions, such as those concerning jury trial, are inapplicable. *Downes* v. *Bidwell*, 182 U. S. 244, 288-347; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138, 140-149; *Balzac* v. *Porto Rico*, 258 U. S. 298, 304-305; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 672-674.

as the citizen subject to American authority abroad has no constitutional right to a jury trial or to indictment—because these constitutional provisions do not operate in foreign lands—so he has no constitutional right to the privilege of habeas corpus until he is brought to this country.[57]

3. *Neely* v. *Henkel*, 180 U. S. 109, seems to us actually to have held habeas corpus unavailable to an American citizen in circumstances comparable to those presented by the current occupations of enemy lands. After the Spanish-American War, Cuba was occupied by American troops, and the American military governor established and confirmed a system of courts for Cuba, as well as a body of civil and criminal law. 180 U. S. at 117-119. Neely, an American employed in Cuba, was accused of violating certain provisions of the postal laws established and confirmed by the military governor. He fled to this country; and upon his arrest for return to Cuba for trial, he sought habeas corpus

[57] The prisoner in *In re Ross*, 140 U. S. 453, first sought a writ of habeas corpus when the ship on which he was being transported, after conviction, from Japan to imprisonment in Albany, reached San Francisco. 140 U. S. at 467.

Since the Army's policy has been, in general, to return citizens convicted by courts-martial overseas and sentenced to terms of longer than six months to the United States for imprisonment, habeas corpus is available to such prisoners on arrival here. Cf. *Wade* v. *Hunter*, 336 U. S. 684; *Humphrey* v. *Smith*, 336 U. S. 695. Women citizens convicted by the military government courts in Germany (now the courts of the High Commission) are returned to the United States immediately after final conviction, regardless of the length of sentence; male citizens convicted by those courts are returned, after final conviction, if their sentences exceed six months.

here on the ground, among others, that his extradition would be illegal since he would not be able to obtain habeas corpus in Cuba—if that should become necessary—and thus would there be deprived of a fundamental constitutional right. The Court, speaking through Mr. Justice Harlan (then the foremost exponent of the geographic extension of constitutional rights) rejected this contention because "those provisions [*i.e.*, 'the provisions of the Federal Constitution relating to the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument'] have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U. S. at 122. See also *supra*, pp. 47, 66.

As we have pointed out (*supra*, pp. 65-66), the enemy countries now occupied or controlled by the United States are in the same status of a "foreign country or territory * * * occupied by or under the control of the United States" (180 U. S. at 111) as was Cuba after the War of 1898. The United States holds authority in those foreign regions by virtue of the enemies' defeat, and is free to establish tribunals and exercise governmental powers. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393-394; *Dooley* v. *United States*, 182 U. S. 222, 230-231; *MacLeod* v. *United States*, 229 U. S. 416, 424-425. In those friendly foreign areas

where we also now have authority, it is by agreement with the foreign government, and the controlled domain remains alien territory. *In re Ross*, 140 U. S. 453, 464; *United States* v. *Spelar*, 338 U. S. 217, 219. In both cases—of enemy and non-enemy occupied areas—the region is "without the jurisdiction of the United States," and the American citizen who transgresses the rules of the occupying power is violating the laws of a foreign country and not of the United States, in the sense in which those terms were used in *Neely* v. *Henkel*. It follows from that holding that they are not constitutionally entitled to habeas corpus while they are held abroad.

4. Again, we stress that our argument is limited to the requirements of the Constitution. It may well be that it would be wise and just for Congress to make the writ accessible to citizens detained outside the country. But like so many other beneficent privileges, the Constitution does not compel Congress to make this provision, and it is for Congress to say whether the present right to the writ should be amplified, and what the conditions of the extension should be. *Supra*, pp. 31, 58-59, 70-71.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Supreme Court of the United States

October Term, 1949—No. 306

LOUIS A. JOHNSON, Secretary of Defense of the United States, *et al.*,

Petitioners,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of Case.

The prisoners are German nationals who, during World War II, were engaged in admittedly legal activities on behalf of their native land in conjunction with one of its Allies. They are 21 civilians, two of whom were in the German Embassy and Consular Service in Japanese occupied China,—two of whom were in the German Information Bureau, an agency of the German Embassy,—one of whom was in the German News Agency known as "DNB",—and the remaining sixteen of whom were in an intelligence office known as "Bureau Ehrhardt" (R. 10-11).

Their activities were legally, and properly conducted within the rules of warfare in the cities of Shanghai, Canton and Peiping—all of which were in that part of China that was occupied by the armed forces of Japan (R. 4).

After the war between the United States and Japan came to an end on August 15, 1945, the prisoners were

arrested, charged with violation of the laws of war, tried and convicted by an American Military Commission (R. 4-7). The gist of the allegations was that the prisoners had continued their activities on behalf of Japan after the surrender of Germany on May 8, 1945, and that the activities which had been legal prior to May 8, 1945, became illegal after that date by reason of the document signed by "Friedeburg", "Keitel", and "Stumpff" which purported to surrender "all forces on land, at sea, and in the air", who were on that date "under German control". In short, the prisoners were charged with having continued to fight on the side of one of their surrendered country's allies as did the Free French, Poles, Belgians, Dutch, Filipino guerrillas and others who have not been tried as war criminals, but who have been hailed as heroes for their patriotic constancy (R. 3-5, 26-48).

The charge, evidence, and proof show that prisoners were not under the "control" of the surrendering parties, but were at all times in Japanese-occupied territory. The charge does not allege that the prisoners were ordered to surrender, but on the contrary the charge (as implemented by a Bill of Particulars) alleges that they were ordered to "furnish aid and intelligence to the Japanese armed forces" (R. 36-48).

Although all hostilities had long since ceased, and there was neither military government or occupation nor a declaration of martial law in China, the prisoners were tried together in a common trial by an American Military Commission set up in a friendly soverign state in violation of treaty and international law. The trial was conducted without regard to the rules of evidence or the rights of an accused to a fair and impartial trial as guarantged by treaty, by international law, and by the Statutes and Constitution

of the United States (R. 5, 48-57). The prisoners were sentenced to imprisonment for terms ranging from two years to life, and the sentences were confirmed and ordered executed, not by a field commander engaged in the prosecution of war, but by the Chief of a United States Army "Advisory Group", whose sole status in China was that of technical advisor to a friendly government (R. 8, 57-62).

The prisoners were shipped, after sentence, to Landsberg Prison in the American occupation zone in Germany, where they are now confined. They brought this petition for a writ of habeas corpus in the District Court of the United States for the District of Columbia, to test the validity of the trial and convictions. Their immediate custodian is subordinate to and answerable to your present petitioners. Unlike other applications for the writ that have recently been brought before American courts, there is not here involved any International Tribunal or Allied Military Government Tribunal. We have here (as in *Ex Parte Quirin,* 317 U. S. 1 (1942) and *In re Yamashita,* 327 U. S. 1 (1946)) a purely American military commission set up under the purported authority of an agency of the United States alone.

The District Court (TAMM, J.) dismissed the petition for lack of jurisdiction and consequently did not reach the question whether the petition stated a cause of action for the relief sought (R. 21-22). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed Judge TAMM and held that the district court has jurisdiction to grant the writ, despite the fact of confinement outside the District, where personal jurisdiction is obtained within the District over persons who have directive power by line of authority over the jailer. The Court of Appeals, however, did not make a final disposition of the

case. The Court held that the record appeared to disclose questions of fact and law which would have to be disposed of in the District Court before a final decision or, indeed, even a decision upon the sufficiency of the petition, could be rendered. The Court of Appeals consequently remanded the case for further proceedings (R. 82).

Respondent then moved for rehearing, requesting the Court of Appeals to pass upon the merits of the petition (R. 84-85). This motion was denied (R. 86).

ARGUMENT.

1. Certiorari should be denied because the case is not ripe for Supreme Court decision.

A. The record does not present a final order.

The decision of the United States Court of Appeals for the District of Columbia Circuit did not finally dispose of the case. The Court ordered the matter remanded to the District Court for further proceedings (R. 82). These further proceedings involve

(1) "the controlling issues of *law*"—to use the language of the Court below (R. 82)—*i. e.*, the basic issue on the merits; as well as

(2) issues of *fact* that may or "may not remain" after disposition of legal issues (R. 82). Conceivably these questions of fact go even to the question of the jurisdiction of the District Court, because the Court of Appeals pointed out that "upon its further consideration of the case, the District Court may find that one or more of respondents have no directive power by line of authority, over the jailer * * * " (R. 82).

B. Cognizant of this situation, respondent petitioned for rehearing, which motion was denied.

After the decision by the Court of Appeals, respondent petitioned that Court to give consideration to and make disposition of the fundamental legal issues that were left undecided (R. 85). Respondent pointed out that the legal question of sufficiency of the petition was before the Court of Appeals and was necessarily presented for adjudication assuming that the jurisdictional point had been disposed of (R. 84). The Court below, however, denied the petition for rehearing without stating its reasons (R. 86).

It may be that the Court of Appeals did not agree with the respondent's contention that there were in reality no remaining questions of fact (R. 85), in which case it would appear to be essential that such fact questions be disposed of before the Supreme Court be asked to act. Or it may be that the Court of Appeals did not desire to decide the merits in advance of some consideration by the District Court. Viewed in this light, the Supreme Court is either being asked to make a final decision on the merits without benefit of consideration by the District Court or the Court of Appeals—or the Supreme Court is being asked to decide this case piecemeal.

C. A piecemeal decision should be avoided.

If the Supreme Court should act favorably on the petition for writ of certiorari and then if upon consideration of the matter this Honorable Court should uphold the decision of the Court below, there would still be no final disposition. The case would then presumably again run the full course of judicial determination, eventually reaching the Supreme Court a second time. Not only would such a proc-

ess involve the administrative problem of piecemeal decision, but it would subject the prisoners to a heavy financial burden that they cannot afford to bear, and it would result in unnecessary and protracted delays.

In other words, granting of the writ of certiorari may work irreparable damage upon the prisoners. Denial of the writ cannot possibly harm the Government. The prisoners are neither freed nor are they on bail. They remain in custody,—and presumably that status will be unchanged no matter what the final decision as to the jurisdiction of the District Court. If the legal position taken by the respondent is correct, then the prisoners should be released as soon as possible and without the unnecessary delay entailed in a piecemeal disposition of their claims. If, on the other hand, their position eventually proves untenable, they simply remain incarcerated—as at present.

2. Certiorari should be denied because the Court below was not in error.

Assuming that the United States Court of Appeals for the District of Columbia Circuit did decide that the United States District Court for the District of Columbia definitely has jurisdiction to hear this case, respondent does not maintain that this does not raise an issue of sufficient importance for disposition by this Honorable Court. We do maintain, however, that such finding by the Court of Appeals was so eminently proper that there is no necessity for disturbing it. The opinion of PRETTYMAN, J., for the Court below, together with the concurring opinion in *Hirota* v. *MacArthur*,

No. 239, Misc. 1948 Term, decided June 27, 1949,—by the author of the opinion in *Ahrens* v. *Clark*, 335 U. S. 188 (1948), should make further elaboration unnecessary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

306

LOUIS A. JOHNSON, Secretary of Defense of the United States, et al.,

Petitioners,

v.

HAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, Secretary of Defense of the United States, et al.,

Petitioners,

v.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals (R. 53-62) is reported at 174 F. 2d 961. The opinion of the District Court (R. 16-17) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1949 (R. 63) and a petition for rehearing (R. 64-65) was denied on June 6, 1949 (R. 66). The petition for writ of certiorari was filed on September 1, 1949, and was granted on November 14, 1949 (R. 69). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Constitutional Provision and Statute Involved

Article I, § 9, cl. 2 of the Constitution provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. C. (1948 rev.) 2241 provides in pertinent parts:

> "§ 2241. *Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless:
>
> * * * * * * *
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations * * *."

Statement

The prisoners are German nationals who, during World War II, were engaged in admittedly legal activities on behalf of their native land in conjunction with one of its Allies. They are twenty-one civilians, two of whom were in the German Embassy and Consular Service in Japanese occupied China—two of whom were in the German Information Bureau, an agency of the German Embassy—one of whom was in the German News Agency, known as

"DNB"—and the remaining sixteen of whom were in an intelligence office known as "Bureau Ehrhardt" (R. 8).

Their activities were legally, and properly conducted within the rules of warfare in the cities of Shanghai, Canton and Peiping—all of which were in that part of China that was occupied by the armed forces of Japan (R. 3).

After the war between the United States and Japan came to an end on August 15, 1945, the prisoners were arrested, charged with violation of the laws of war, tried and convicted by an American Military Commission (R. 3-5). The gist of the allegations was that the prisoners had continued their activities on behalf of Japan after the surrender of Germany on May 8, 1945, and that the activities which had been legal prior to May 8, 1945, became illegal after that date by reason of the document signed by "Friedeburg", "Keitel", and "Stumpff" which purported to surrender "all forces on land, at sea, and in the air" who were on that date "under German control". In short, the prisoners were charged with having continued to fight on the side of one of their surrendered country's allies as did the Free French, Poles, Belgians, Dutch, Filipino guerrillas and others who have not been tried as war criminals, but who have been hailed as heroes for their patriotic constancy (R. 2-3, 18-33).

The charge, evidence, and proof show that prisoners were not under the "control" of the surrendering parties, but were at all times in Japanese-occupied territory. The charge does not allege that the prisoners were ordered to surrender, but on the contrary the charge (as implemented by a Bill of Particulars) alleges that they were ordered to "furnish aid and intelligence to the Japanese armed forces" (R. 25-33).

Although all hostilities had long since ceased, and there was neither military government or occupation nor a declaration of martial law in China, the prisoners were tried together in a common trial by an American military commission set up in a friendly sovereign state in violation of treaty and international law. The trial was conducted with-

out regard to the rules of evidence or the rights of an accused to a fair and impartial trial as guaranteed by treaty, by international law, and by the statutes and Constitution of the United States (R. 3-4, 34-40). The prisoners were sentenced to imprisonment for terms ranging from two years to life, and the sentences were confirmed and ordered executed, not by a field commander engaged in the prosecution of war, but by the Chief of a United States Army "Advisory Group", whose sole status in China was that of technical advisor to a friendly government (R. 6, 40-43).

The prisoners were shipped, after sentence, to Landsberg Prison in the American occupation zone in Germany, where they are now confined. They brought this petition for a writ of habeas corpus in the District Court of the United States for the District of Columbia, to test the validity of the trial and convictions. Their immediate custodian is subordinate to and answerable to your present petitioners. Unlike other applications for the writ that have recently been brought before American courts, there is not here involved any International Tribunal or Allied Military Government Tribunal. We have here (as in *Ex Parte Quirin*, 317 U. S. 1 (1942) and *In re Yamashita*, 327 U. S. 1 (1946) a purely American military commission set up under the purported authority of an agency of the United States alone.

The District Court (TAMM, J.) dismissed the petition for lack of jurisdiction and consequently did not reach the question whether the petition stated a cause of action for the relief sought (R. 16-17). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed Judge Tamm and held that the district court has jurisdiction to grant the writ, despite the fact of confinement outside the District, where personal jurisdiction is obtained within the District over persons who have directive power by line of authority over the jailer. The Court of Appeals remanded the case for further proceedings (R. 53-63).

Respondent then moved for rehearing, requesting the Court of Appeals to pass upon the merits of the petition (R. 64-65). This motion was denied (R. 66). The matter is before this Court by reason of a writ of certiorari granted November 14, 1949 (R. 69).

Question Presented

Does the United States District Court for the District of Columbia have jurisdiction to entertain a petition for a writ of habeas corpus brought on behalf of twenty-one German nationals who are confined in an American prison in the American occupied zone of a conquered country, to test the validity of such confinement pursuant to trial and conviction by an American military commission—where the petition names the responsible Government officials under whose authority the prisoners were tried, convicted, and are being confined and whose authority must be exercised if they are to be released, such named persons and their offices, records, and staffs being permanently located in the District of Columbia?

Summary of Argument

The purpose of this proceeding was twofold: to test the validity of the trial, conviction and confinement by the United States of the twenty-one German nationals in whose behalf it was brought; and to secure their release if such confinement is held to be unlawful. The respondent maintains that the United States Court of Appeals for the District of Columbia Circuit was correct in holding that the United States District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus that named the responsible Government officials under whose authority the prisoners were tried, convicted and are now confined, and whose authority must be exercised if they are to be released.

Basically respondent believes the Court of Appeals was correct, because any other decision would result in an indefensible situation. It would make the exercise of fundamental rights depend on the accident of locus of incarceration. It would allow the Military effectively to destroy rights which this Court has affirmed to persons tried before an American military commission for purported violations of the laws of war—simply by strategic choice of a place of confinement.

The Government seeks to reverse the Court of Appeals. Specifically answering their argument, respondent contends:

I

A. The habeas corpus statute (28 U. S. C. §§ 2241-2255) is plenary and places no limitation on the writ. Section 2241 provides that "writs of habeas corpus may be granted by * * * the district courts * * * within their respective jurisdictions." In *Ahrens* v. *Clark*, 335 U. S. 188, this Court construed the statute, and particularly the phrase "within their respective jurisdictions", to enunciate the reasonable rule of venue that petitioners confined within the territorial jurisdiction of a district court are denied process within any other district. The Court specifically reserved the question herein posed, the remedy available to prisoners tried and confined by reason of American authority in an area beyond the territorial limits of any district court. The Court of Appeals, therefore, correctly ruled that *Ahrens* v. *Clark* did not foreclose district court jurisdiction in this case.

B. Congress did not intend to create a gap in the availability of the writ of habeas corpus. Legislative history indicates that in using the words "within their respective jurisdictions" the lawmakers were concerned with problems of jurisdiction *inter sese*. The aim of habeas corpus statutes taken as a whole was to enlarge, not to limit, the common law meaning of *habeas corpus*.

C. Nor do state laws and practices support the Government's contention. Problems of extraterritoriality are beyond the concept of the individual states. Furthermore, the two classical exceptions disprove the Government's claim that Congressmen must have assumed there was lack of power in the courts to entertain the petition of one confined beyond the territory. These exceptions are those involving the custody of children and the pre-*Ahrens* v. *Clark* cases involving District of Columbia penal institutions in Virginia.

D. The concept of "habeas corpus" had a common law history that encompasses the instant problem. English precedent indicates that the writ historically reached "to all dominions of the Crown", and there are a number of instances of writs being granted in English courts at the behest of prisoners who were beyond the territorial jurisdiction of the courts. In addition, however, American courts and statutes have extended the English common law concept of habeas corpus, and this Court has held that it is not "necessarily confined to the precise forms of that writ in vogue at the common law as in the English judicial system."

E. Section 4 of the habeas corpus statute specifically applies to the prisoners here. They are "citizens of a foreign state * * * domiciled in a foreign state * * * in custody * * * for acts done or omitted under alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of a foreign state, or order thereof, the validity and effect whereof depend upon the law of nations." Although this statute was originally passed to assert federal dominance in a federal-state conflict of power, its wording indicates a purpose beyond its motivating cause—namely, to assure supremacy of the federal court in this type of matter by whatever authority it be challenged.

II

Interpretation of the habeas corpus statutes so as to deny jurisdiction to issue the writ in this case would constitute a suspension of the writ in violation of Article I, Section 9, of the Constitution. Whatever gap there may be in the statute, there is certainly none in the Constitution, which secures the privilege of the writ to all persons illegally confined by American authority. The draftsmen of the Constitution intended the scope of the writ to be co-extensive with the power of the Executive to restrain bodily liberty. Any limitation upon that scope based upon the locus of confinement would make the availability of the writ depend upon the whim of the jailer. Any limitation based upon the alienage of the person confined would have the effect of sanctioning unconstitutional and illegal detentions and would defeat expressed constitutional and statutory policies applicable to aliens as well as citizens.

III

The fact that the upholding of jurisdiction will place a burden of adjudication upon the District Court for the District of Columbia cannot afford a basis for denying jurisdiction. Even if it were true that the effect of an affirmance could be to flood the District Court with litigation, that circumstance would not justify the Court in shirking an obligation imposed upon it by the Constitution and Congress. This is particularly true where the cases pose fundamental questions and involve capital punishment or long prison sentences. In no event, however, could affirmance in this case have the effect predicted by the Government since the Allied Military Government cases, which represent the overwhelming preponderance of cases abroad, would not be affected. If the administrative burden should become great, however, the remedy would lie in a distribution of the petitions throughout the circuits pursuant to Congressional action.

IV

The petitioners, as superiors in the direct line of command over the Commandant of the prison, with admitted power to effectuate the release of the prisoners, are proper parties to whom the writ may be addressed. In view of the concession by the Government that the named officials have power to effectuate any order of the Court, the circumstance that they are not the actual jailers is irrelevant. It has never been the invariable rule that the writ must be directed against the immediate jailer. To deny relief to persons overseas because their immediate jailers are also overseas would reverse the entire history of the writ by denying it upon a trifling technicality.

ARGUMENT

I

The habeas corpus statute is plenary and places no limitation on the writ.

A. This Court has not interpreted the statute so as to limit the availability of the writ to test the legality of restraint of liberty by reason of purely American authority; it has only given guidance as to the proper forum for its exercise.

Respondent contends that the U. S. Court of Appeals for the District of Columbia Circuit was correct in its holding that the statute, 28 U. S. C. 2241, provides that the U. S. District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar. The statute provides in pertinent part:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

The Government contends that the last four words quoted above postulate a requirement that he who petitions for the writ must be confined within the territorial boundaries of the particular judicial district involved,—that is, that the Court of Appeals was in error because the prisoners are not confined within the District of Columbia. The Government relies on *Ahrens* v. *Clark*, 335 U. S. 188.

In the *Ahrens* case, a group of German nationals confined on Ellis Island, New York, filed a petition for a writ of habeas corpus in the U. S. District Court for the District of Columbia, alleging that they were subject to the custody and control of the Attorney General. This Court held that the District Court for the District of Columbia was without jurisdiction to entertain the petition.

The essential facts of the *Ahrens* case, are thus quite different from those presented here. In the *Ahrens* case, the petitioners had an obvious remedy in the District Court for the Southern District of New York. The effect of the decision, therefore, was not to suspend the writ of habeas corpus, but simply to relegate the petitioners to a more convenient and expedient forum. In the case at bar, however, the respondents, although Federal prisoners, are not located in any territory specifically allotted to any District Court—although their jailers are.

The distinction between the two types of cases was recognized and expressly provided for by the Court in the *Ahrens* case (p. 192, footnote 4):

> "We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. Cf. *Betz, Durant, Wills, Cutino, Walczak, McKinley, Murphy*, 329 U. S. 672."

It is thus apparent that this Court did not decide the question presented herein, but on the contrary, expressly reserved it. The cases cited at the end of the above statement are all cases where the petitioners were confined by the United States Army in Germany, and forwarded orig-

inal petitions for writs of habeas corpus directly to the Supreme Court. Although the writs were denied, the Court's per curiam notation indicated that the reason was "want of original jurisdiction." And significantly the following statement was appended:

> "Mr. Justice Black and Mr. Justice Rutledge are of the opinion that as in *Ex parte Hauk*, 231 U. S. 114 (see also *White* v. *Ragen*, 324 U. S. 760, 765) where this Court declined to entertain an application for relief by habeas corpus, the petition for habeas corpus should be denied without prejudice to it being filed in the appropriate District Court. See *Ex parte Endo*, 323 U. S. 283, 304-306.
>
> "Mr. Justice Murphy is of the view that this petition raises questions as to jurisdiction and proper procedure which should be heard and determined by this Court."

See also:

In re Bush, 336 U. S. 971.

The Government, however, relies on general language in the *Ahrens* decision which it claims indicates that presence of a petitioner within the territorial confines of the district court is an essential prerequisite of its *power* to act. It, therefore, becomes fruitful to examine subsequent explanatory language used by the author of the *Ahrens* opinion.

In his concurring opinion in *Hirota* v. *MacArthur*, 338 U. S. 197, at 201-202, Mr. Justice Douglas sheds further light on the disputed language:

> "* * * In *Ahrens* v. *Clark*, supra, we were dealing with the distribution of judicial power among the several District Courts. There was an explicit legislative history, indicating disapproval of a practice of moving prisoners from one district to another in order to grant them the hearings to which they are entitled. We held that the court at the place of confinement was

the court to which application must be made. But it does not follow that, where that place is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.

"* * * In *Ahrens* v. *Clark*, supra, denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. * * *

* * * * * * *

"* * * The allocation of jurisdiction among the District Courts, recognized in *Ahrens* v. *Clark*, is a problem of judicial administration not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ."

The practical wisdom of *Ahrens* v. *Clark* is clear. Any other result would tend to channel into the District of Columbia thousands of habeas corpus proceedings which could with equal fairness to the prisoner and greater dispatch and convenience be tried in the local district courts. But the extension of the decision to the case at bar would be unconscionable. It would deny the possibility of any judicial scrutiny of the administration of military justice if the prisoner is held abroad.

This Court held in *In re Yamashita*, 327 U. S. 1 (1946), and in *Ex parte Quirin*, 317 U. S. 1 (1942), that an accused enemy war criminal may come into the American Courts and challenge the fundamental constitution of the tribunal which tried him and the charge. Yamashita and Quirin got into Court without question because they were in prison on American soil. Is the accident of imprisonment abroad to defeat the day in court? Is the power to be placed in Army hands to determine, by the mere shifting of a prisoner from or to the United States, whether there is to be judicial scrutiny of its quasi-judicial acts?

Today the American forces are spread throughout the world and American military justice governs many millions, including vast numbers of Americans abroad as well as foreigners. *Ahrens* v. *Clark*, we submit, does not deny

these millions their day in court; it merely enunciates a reasonable rule of venue under the Judicial Code.

B. The language of the habeas corpus statute was not intended to create a gap in the availability of this fundamental writ.

Congressional enactments since the first habeas corpus statute was passed in 1789—specifically laws passed in 1833; 1842, 1863 and 1867, have steadily enlarged the scope of the writ. (See note in 18 Fed. 68.) The statute which included the controversial phrase: "within their respective jurisdictions" was enacted in 1867. The Government contends that Congress intended those words to bar the instant case.

Of course no Congressman in 1867 intended, by reason of adoption of that clause, to draw a distinction between the rights of a defeated enemy General tried for war crimes and incarcerated in Manila (*In re Yamashita*, 327 U. S. 1) and the respondents tried by an American tribunal in China and incarcerated in Germany. Considering the problems of 1867, it is clear, as the legislative history cited in *Ahrens v. Clark* demonstrates, that the phrase "within their respective jurisdictions" was adopted in order to make certain that, to paraphrase the words of one legislator, a district judge in Florida did not grant habeas corpus to persons confined in Vermont. Compare the discussion of the legislative history in Fairman, Some New Problems of the Constitution Following the Flag (1949) 1 Stanford L. Rev. 387, 634-639.[1] Congress was not considering the rights of persons outside the country, and its words demonstrate that it was only with problems among jurisdictions *inter sese* that it was concerned.

[1] Pursuant to exhaustive research on the legislative history of the 1867 statute, Fairman concludes (p. 639): "Congress had set out to make the writ of habeas corpus available in one more situation—not to legislate about the territorial reach of the courts or the judges. * * * And if the Court were so to apply its constructions as to place the writ beyond the reach of a military prisoner overseas, it would achieve precisely the result that Congress was unwilling to authorize. * * *"

If we are to examine the purpose of Congress, heed must be given not to these isolated words of jurisdiction, which were intended as a specific solution to a specific supposed problem, but to the whole body of habeas corpus statutes. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion." Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 21.

The purpose of Congress has already been stated by this Court. Habeas corpus legislation, said Mr. Chief Justice Chase in *Ex parte McCardle*, 6 Wall. 318, 325-326, "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties or law. It is impossible to widen this jurisdiction." And it is impossible to read 28 U. S. C. §§ 2241 *et seq.* without concluding as did Mr. Chief Justice Chase, that they are as comprehensive as possible and, as did the Court of Appeals, that they are "coextensive with executive power, at least in so far as prisoners in jail are concerned." Or, as one Congressman stated in proposing the statute which now contains the words "within their respective jurisdiction": "This bill has been introduced, the effect of which is to enlarge the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them." Cong. Globe, 39th Cong., 2d Sess. 730 (1867). And a reading of the history of continuous Congressional expansion of the writ, see, *e.g.*, *In re Neagle*, 135 U. S. 1; *Frank* v. *Magnum*, 237 U. S. 390; The Freedom Writ—the Expanding Use of Habeas Corpus (1948), 61 Harv. L. Rev. 657, carries one to the same conclusions.

It is true, as pointed out by the Government, that Section 16-801 of the District of Columbia Code by its terms limits jurisdiction to persons confined within the District. This is, however, an entirely independent statute applicable only to such persons, and no more in point here than it was in *Threats* v. *Clark*. The existence of that statute,

however, explains the decision in *McGowan* v. *Moody*, 22 App. D. C. 148 (1903). That case, which is cited with approval in the Government's brief, held that the District Court for the District of Columbia lacked power to issue the writ to the Secretary of the Navy with respect to an American sailor confined in jail by the Navy on the Island of Guam. The opinion of the Court of Appeals in that case discloses that the petitioner apparently relied on the District Code and never presented for the court's consideration the broad plenary language of the Judicial Code.

C. State laws and practices do not support the Government's contention.

The state and territorial legislation compiled and referred to by the Government is irrelevant. Not only do statutes of individual states have no authoritative bearing on this federal question, but by their very nature and definition the individual states do not normally face the problem of extraterritoriality herein posed.

(1) The two classical types of exception disprove the Government's point. The first has to do with cases involving the custody of children. Here the general rule is that confinement within the state is immaterial. The only requisite is that the person responsible for the custody be within the state. As stated by Judge Cooley in *Matter of Samuel W. Jackson*, 15 Mich. 417, 439-440:

> "The important fact to be observed in regard to the mode of procedure upon this writ is that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint."

(Cited with approval in *Ex Parte Mitsuye Endo*, 323 U. S. 283, 306 (1944).)

See also *Rivers* v. *Mitchell*, 57 Iowa 193 (1881); *Breene* v. *Breene*, 51 Colo. 342, 345-346 (1911); *Shaw* v. *Shaw*, 114 S. C. 300 (1920); cf. *People ex rel. Billotti* v. *New York Juvenile Asylum*, 57 App. Div. (N. Y.) 383 (1901).

The Government maintains that cases of this type are *sui generis*, apparently on the theory that "the true parties in interest" are in the state. However, in such cases, as here, the petitioner is not within the territorial boundaries of the state, and the party under whose authority the petitioner is confined *is* within those boundaries. Nevertheless, despite express statutory language that would appear to dictate a contrary result, these courts have made their interpretations in light of the common law.

Similarly in the case at bar, the petition for the writ named the responsible officers of the United States Government under whose authority the prisoners were tried and convicted and are now confined, and whose authority must be exercised if they are to be released. These persons are in the District of Columbia, not transiently, but permanently, and so are their headquarters, central records, and key subordinates and staffs. They have been personally served with process and are readily answerable and amenable to further process of the Federal courts in the District of Columbia. No special factors of hardship or inconvenience or of supervening public policy are involved; nor is there any question but that there will be due and prompt compliance by the petitioners and, through them by their subordinates, with any orders which such courts may issue with respect to the prisoners. These circumstances establish a close nexus between the District Court and the parties and subject matter of this proceeding. See Fairman, *op. cit.* at page 643.

(2) The second exception to the argument involving local sovereignties has to do with the rare cases in which the element of extraterritoriality does exist. Thus, the District of Columbia maintains as part of its penal system, workhouses at Occoquan, Virginia, and at Lorton, Virginia. Prior to the Supreme Court decision in *Ahrens* v. *Clark*

(supra), the Court of Appeals for the District of Columbia Circuit had held that the District Court for the District of Columbia could issue the writ with respect to prisoners confined in those Virginia institutions. *Sanders* v. *Allen*, 69 App. D. C. 307, 100 F. (2d) 717 (1938); and see *Burns* v. *Welch*, 159 F. (2d) 29 (C. A. D. C. 1947). See also *Sanders* v. *Bennett*, 80 App. D. C. 32, 148 F. (2d) 19 (1945). Since the *Ahrens* decision, such petitioners have been relegated to their rights in the U. S. District Court in Virginia, but the fact remains that for many years the rule was otherwise. It is difficult, therefore, to find support for the Government's contention that there was a "universality" of conception of the writ on a territorial basis (where extraterritorial conditions existed) that demonstrates an embodied limitation "inherited from the common law" of which Congress must have taken cognizance.

D. The concept of "Habeas Corpus" had a common law history that encompasses the instant problem.

The Government contends that English precedents indicate that the writ of habeas corpus did not extend to aliens confined abroad. Respondent maintains (1) that this is not so—and (2) in any event, if such precedents were of a limiting nature, they are no longer governing, our courts having constantly expanded habeas corpus jurisdiction.

(1) It is unlikely that a petition involving precisely this type of extraterritoriality has previously been brought to bar—that is, a trial by an American tribunal in a friendly country, after which the prisoners are incarcerated in an American prison located in the American occupation zone of a conquered country. However, some analogy may be found in some of the English cases involving petitions brought by prisoners who were confined beyond the seas, with the writ running to persons within the process of the court who had it in their power to effectuate the prisoner's release. Thus, narrowing the issue, there is ample

English precedent demonstrating that the writ ran beyond the territorial confines of the nation wherein the petition was brought.

Historically, the writ of habeas corpus ran "to all the dominions of the Crown". Church, *The Writ of Habeas Corpus* (2d Ed. 1893), § 107. Thus there are cases that show that in 1619 the writ ran to the "Cinque Ports" (*Bourne's Case*, 4 Cro. Jac. 543), in 1626 to the Counties Palatine (*Jobson's Case*, Latch 160) in 1669 to the islands of Jersey and Guernsey (*Rex* v. *Salmon*, 2 Keble 450), and in 1681 to Ireland (*Anonymous*, 1 Ventris 357).

Various defects in the writ of habeas corpus, "illustrated by the arbitrary proceedings of Clarendon, who, in 1667, was accused of sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner'," 9 Holdsworth, *History of British Law* (1926) 116, resulted in the Habeas Corpus Act, 31 Car. II, sec. 58. This act provided that:

> "No persons are allowed to alter a prisoner's place of confinement except in certain specific cases defined by the Act. No prisoners may be sent to Scotland, Ireland, or parts beyond the seas. The writ is to run into the counties palatine and all other privileged places" (9 *Id.* at 118).

Church (*The Writ of Habeas Corpus*, 2d Ed. 1893, § 107) states that the Act of 31 Car. II (and subsequent statutes) were "but affirmatory of the common law principles. * * *" This would appear to be correct, for Section XI of the Act specifically says:

> "A habeas corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding."

As we have seen, sixty years before this enactment the writ had been held to extend to the Cinque Ports, and ten years before, to Jersey and Guernsey (supra).

The Government, however, makes much of the fact that another section of this statute, Section *XII*, contains severe sanctions directed against removal of prisoners to distant points. These sanctions, it is argued, constitute "legislative recognition that such removals defeat the jurisdiction of English courts to order production of the bodies of the prisoners thus removed and to inquire into the legality of their imprisonment by habeas corpus" (Government brief, p. 39). Respondent submits that this is and must be a *non-sequitur*. It cannot be a correct deduction, because not only had it previously been held that the writ ran to some of the very locations mentioned in Section *XII*, but the preceding section of this very act affirmed that the writ did run to such areas. Thus, specifically, Section *XII* proscribed the transportation for imprisonment purposes of any English resident to "Scotland, Ireland, *Jersey, Guernsey*, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors." (Emphasis supplied.)

It is respectfully suggested that there were serious practical considerations that dictated the advisability of Section *XII* and that had nothing to do with jurisdiction. The problem of communications in 1679 was such that only the most fortunate of prisoners could avail himself of his jurisdictional rights if he were physically removed from England. Clearly the courts' powers were in no way infringed by the device of removal where a responsible supervisory official resided in England—but the chances were that the device would succeed in preventing the matter from ever commanding the courts' attention.

In any event, both before and since 1679, the English courts have consistently allowed the writ to persons confined abroad. *Ex parte Anderson*, 3 El. and El. 487, 121

Eng. Rep. 525; *Rex* v. *Coule*, 2 Burr, 834, 97 Eng. Rep. 587;[2] *Carus Wilson's* case, 7 Q. B. 984, 115 Eng. Rep. 759; see also Church, *Habeas Corpus* (1893) § 107. The case cited by the Government, *In re Ning Yi-Ching et al.*, 56 T. L. R. 3, holds only that the writ of habeas corpus would not run to a part of the world "which was not a part of the King's dominion or realm", an obvious holding since the writ could not there be enforced. The British concession in Tientsin was unique in character and "had never been recognized as nor was it, a part of the King's dominions." The American occupation of Germany can hardly be analogized to it; the British were in effect mere lessees. Secondly, in the *Ning Yi-Ching* case, which involved Chinese in the British concession of Tientsin, as a practical matter there was no person to whom the writ could be directed. And in the third place, the British were not exercising judicial or quasi-judicial power in Tientsin; they were holding Chinese prisoners for trial in a Chinese Court.

Indeed, the *Ning Yi-Ching* decision is authority against the position taken by the Government. For it recognized that the remedy of habeas corpus is "not confined to British subjects". Clearly, in the *Ning Yi-Ching* case, even if the petitioners had been British rather than Chinese the writ could not have issued.

The decision in *Rex* v. *Earl of Crewe* (1910) 2 K. B. 576, 26 T. L. R. 439, also is contrary to the Government's position. There the writ was sought for one Sekgoine Letsholathibe, the hereditary chief of the Batawana tribe in Bechuanaland, who was confined under authority of the High Commissioner in that British Protectorate. The King's Bench Division of the High Court of Justice (Lord Alverstone, P. J., and Ridley and Darling, JJ.) discharged a

[2] A statutory modification was made by the Habeas Corpus Act of 1862 as a result of the decision in *Ex parte Anderson*, *supra*, which had directed the writ to Canada, so that the writ would not run to places where there were courts competent to issue and enforce obedience to the writ. See *Rex* v. *Earl of Crewe* (1910) 2 K. B. 576, 26 T. L. R. 439; 9 Holdsworth, *History of English Law* (1926), 124-125.

rule to show cause why the writ should not issue, on the grounds (1) that the Bechuanaland Protectorate was a "foreign dominion of the Crown, &c." within the meaning of the statute passed in 1862 suspending the writ in "any Colony or Foreign Dominion of the Crown" where local courts were available (see note 2, p. 20, supra) and (2) that the Colonial Secretary was not the proper respondent. On appeal to the Court of Appeal (Vaughan, Williams, Farwell and Kennedy, L. JJ.) judgment was affirmed, principally upon the ground that a provision in the Proclamation that no writ involving detention of Sekgome should have any effect, was valid. As stated by Prettyman, J., in the Court below (R. 57):

> "In the course of the opinion, the judges made clear their opinions that the writ could issue at the petition of persons beyond the seas and that the writ could be addressed to an official having authority over the jailer; although they thought that the High Commissioner and not the Secretary would be the proper respondent, since the Secretary had only advisory power."

It is evident that the writ was denied because it had been suspended (a power given to the English Parliament but not to the American Congress) and were it not for the suspension, it would have been granted. Specifically, none of the judges denied that the writ would have issued to a non-British subject abroad, if the writ had not been suspended. Kennedy, L.J. explictly stated:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shown that his custodian was detaining him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ is not confined to British subjects. The alien who is detained upon a warrant of extradition is entitled to

apply for a writ of habeas corpus in order to obtain release * * * ".[3]

Kennedy, L.J., incidentally, was the only one of the six judges who considered this matter who indicated any question as to whether the Protectorate was a foreign dominion of the Crown, a view apparently at variance with that held by the other five. The Government (Brief, p. 47) analogizes this minority view to the situation presented in *Neely* v. *Henkel*, 180 U. S. 109—where the problem was not one of jurisdiction at all, but where the Court held that the petitioner, who had violated Cuban law, was given no substantive constitutional claim simply because Cuba was under American military occupation. In the case at bar we are not considering substantive constitutional rights involved in a violation of "the laws of a foreign country" (*Neely* v. *Henkel*, 180 U. S. 109, 122) but we are considering the jurisdictional rights of prisoners who were tried by an American Military Commission for violation of the laws of war under the presumed authority of the American Constitution, Congressional statutes, treaties, and proclamations. The prisoners here do not stand in the position of Neely; substantively they stand in the position of Yamashita and Quirin. The only difference is the accident of locus of incarceration. See Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford Law Review 587, 623-626, 630-631.

In summary of the English precedents, we may say that long before the independence of this country the British found it necessary to enlarge the writ so that it would run outside England itself, since the writ, if limited jurisdictionally, permitted abuses of executive power. Contrary to what the Government states, it has never been decided that the writ may not issue to a foreigner in territory controlled by England, and indeed, the only expressions on the subject are to the effect that the writ is not solely the

[3] Kennedy, L. J., also concurred on the ground that the writ had been lawfully suspended as to petitioner.

right of British subjects. Traditionally, neither petitioner's absence from the territorial jurisdiction of the Court nor his alienage, barred the Court from entertaining the petition where there was a responsible official to whom the writ could be directed.

(2) Assume for purposes of argument that the Government's contention about the English precedents is correct—even so they are not governing. *Frank* v. *Magnum*, 237 U. S. 309, 330-331, unequivocally states that Congress has liberalized the common law procedures of habeas corpus "in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder * * *" See also *Johnson* v. *Zerbst*, 304 U. S. 458, 466-467. The English common law is thus no longer governing as to either the procedures or the scope of habeas corpus. *Frank* v. *Magnum, supra; Johnson* v. *Zerbst, supra;* dissenting opinion of Mr. Justice Frankfurter in *Sunal* v. *Large*, 332 U. S. 174, 184. No more should it be, or has it been, limiting as to jurisdiction. Especially in habeas corpus, jurisdiction to issue is the essence of the substantive right to the writ. "There is no room for niggardly restrictions when questions as to its availability are raised." Concurring opinion of Mr. Justice Douglas in *Hirota* v. *MacArthur*, 338 U. S. 197. And this Court has recognized, in a case relating to jurisdiction, that the English precedents are not governing. Mr. Chief Justice Chase in *Ex parte Yerger*, 8 Wall. 85 wrote:

> "* * * the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States, and this tendency, except in one recent instance, has been constant and uniform."

The argument based upon supposed English precedents is part and parcel of the argument to the same effect in

Price v. *Johnson*, 334 U. S. 266. There the Government argued that since the English courts had never issued a writ of habeas corpus for the purpose of producing a prisoner to argue his own appeal, the American courts were powerless to do so. The Court rejected this contention, saying that a court of appeals, in issuing a writ of habeas corpus is not "necessarily confined to the precise forms of that writ in vogue at the common law as in the English judicial system". The Court refused to read Section 262 of the Judicial Code (now 28 U. S. C. § 2241) "as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"

Elsewhere in the same opinion the Court recognized that the writ of habeas corpus must be elastic, both jurisdictionally and substantively. "The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ." *Id.* at 283. And as Mr. Justice Frankfurter wrote in his dissent in *Sunal* v. *Large*, 332 U. S. 174, 187, "Perhaps it is well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint,' • • • should be left fluid and free from definiteness appropriate to ordinary jurisdiction doctrines", a view which the other dissenters in the same case unqualifiedly endorsed.

In short, in no area—substantive, procedural, jurisdictional—has habeas corpus been limited to the English predecents.

E. Section 4 of the Habeas Corpus statute specifically applies to respondent.

Regardless of whether the general habeas corpus statute permits the respondent to invoke the jurisdiction of the District Court, a statute, especially designed to meet the problems of confinement of foreigners under American authority, has been passed by Congress, and this statute, although it relates, to be sure, to the substantive right to

the writ, clearly intends that the courts of the United States shall have jurisdiction to issue the writ where officials embarrass the United States in its foreign relations by holding a foreigner in custody. Since such embarrassment is perhaps even more likely to occur where the foreigner is held in custody abroad, rather than within our own territory, the statute is largely unfulfilled if interpreted to permit inquiry on habeas corpus only into restraints at home. 28 U. S. C. § 2241(c) provides:

> "The writ of habeas corpus shall not extend to a prisoner unless—
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations . . . ."

Although phrased in terms of an exception, the legislative history shows that this statute was passed in order to effect a definite grant of power. As was said in *In re Neagle*, 135 U. S. 1, 71 (1890), "this extension arose out of the celebrated *McLeod* case, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus by the Act of August 29, 1842, 5 Stat. 539, C. 257 entitled 'An Act to provide further remedial justice in the courts of the United States.' It con-

ferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations." For a further history of the *McLeod* case and the statute which was passed as a result of it, see 2 Moore's *Digest of International Law* (1906) 24; 1 Morison and Commager, *The Growth of the American Republic* (3d ed. 1942) 475-84; II Warren, *The Supreme Court in United States History* (Rev. Ed.) 65-66, 98-100, 587; *Underhill* v. *Hernandez*, 65 Fed. 577 (2d Cir.) aff'd 168 U. S. 250; *Horn* v. *Mitchell*, 223 Fed. 549 (D. C. Mass.), aff'd 232 Fed. 819 (1st Cir.), appeal dismissed, 243 U. S. 247. See also *People* v. *McLeod*, 25 Wend. 483 and the note in 26 Wend. 663.

Although it is clear that the statute in question was originally passed to assert federal dominance in a federal-state conflict of power (see the remarks of Senator Berrien quoted in *In re Neagle*, 135 U. S. 1), nevertheless the wording of the legislation bespeaks a purpose beyond its motivating cause. There can be no doubt that respondent and those on whose behalf he seeks habeas corpus are within the scope of the statute. They are: (1) citizens of a foreign state; (2) domiciled in a foreign state, whether considered Germany or China; (3) in custody; (4) for acts done or omitted under alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect whereof depend upon the law of nations. This final requirement is clearly met by the charge in the original trial that the respondents both "individually and as officials, nationals, citizens, agents or employees of Germany" acted "in violation of the laws and customs of war" and by the prisoners' present claim that in fact they were not charged with an offense against the laws of war and are protected by the Geneva Convention, by treaties between the United States and China, and by the fact that under international law [illegible] the absence

of hostilities, martial law or American military occupation of China, an American military commission could have no jurisdiction. All the requirements of the statute are thus satisfied. Congress refused after the *McLeod* case to permit flaunting of its authority by states where the laws of nations were concerned and passed a statute in order to prevent such future difficulties. The statute makes no statement that the confinement must be by a state, and the cases which have discussed the statute have made no assumption that it is applicable only to confinements by a state. Indeed the assumption seems to be to the contrary. *Underhill* v. *Hernandez, supra*, 65 Fed. 581, 682; *Horn* v. *Mitchell, supra*, 232 Fed. at 823-824.[4] Its major purpose is to assure supremacy of the federal courts by whatever authority it be challenged. Here the challenge is by the military. This challenge, like that of a state, falls within the wording of the statute.

II

Interpretation of the habeas corpus statutes so as to deny jurisdiction to issue the writ in this case would constitute a suspension of the writ in violation of Article I, Section 9, of the Constitution.

(1)

The issue in this case goes far beyond mere statutory interpretation. It goes to one of our most fundamental governmental postulates: that the Judiciary is guardian of the rights given by the Constitution and laws of the

[4] In the latter case the statute was held inapplicable by the Circuit Court of Appeals, affirming a similar holding by the District Court, 223 Fed. 551-552, on the ground that there was not express or implied national authority for the acts of the petitioners, nor was there any question of international law involved. But both the District Court and Court of Appeals clearly assumed that had the requirements of the statute been met, the German officers, held in custody by federal, not state, authority would have been entitled to the writ.

United States. The entire question here is whether the prisoners are to have a day in court. In order to deny it to them, this Court must say that the Executive can flagrantly violate the Constitution and laws of the United States; while the Judiciary stands by, powerless to act.

As we have indicated, we think it clear that Congress desired no such result, and that it intended the scope of the writ of habeas corpus to be co-extensive with the scope of executive power to restrain bodily liberty. We think it equally clear that, even if it so desired, Congress could not, in view of Article I, Section 9, of the Constitution, effectively denude the federal judiciary of the power to examine into a case of illegal detention under American authority—whether of citizen or alien, whether at home or abroad.

We see no gap in the habeas corpus enactments, such as the Government sees. But if there should be such a gap in the statutes, there is certainly none in the Constitution. In forbidding Congress to suspend "the privilege of the Writ of Habeas Corpus", the draftsmen of the Constitution appended none of the qualifications which the Government now asks this Court to infer. The Constitution does not secure the writ only to citizens, nor only to persons confined within "the respective jurisdiction" of the Federal Courts, or indeed in any other localities. With such fine factual differentiations, the Founding Fathers were not concerned—only with the broad, unquenchable conviction that the Courts should stand guardian over personal liberties and that illegal executive arrests should have their remedy.

We would imagine that the Government would concede the invalidity of a Congressional statute which said that no federal court could issue the writ into Duluth, Minnesota, or into a federal reservation in Wyoming. We would imagine also that it would concede that, by force of the Constitution, the writ would issue to an area included within one of our states or territories, even though, by inadvertence, that area had not been included by Congress

within the jurisdiction of one of the components of the federal judiciary. We say that, also by force of the Constitution, and regardless of what Congress has or has not done, the writ must issue where American officials acting in their official capacity and as representatives of the United States Government have illegally tried and illegally condemned, and now are illegally holding in confinement persons subject to the authority of the United States. The accident—or coincidence—that the confinement is in an American prison in Germany instead of in an American prison in Kansas cannot, we say, impair the responsibility to act imposed by our Constitution upon our judiciary. It is unthinkable that the availability of the historic writ of habeas corpus could be permitted to depend completely upon the whim of the jailer—a jailer who simply by selecting a place of confinement outside the United States could render the Courts impotent to scrutinize his acts.

(2)

This Court held in *Ex Parte Yamashita*, 327 U. S. 1 (1946), and in *Ex Parte Quirin*, 317 U. S. 1 (1942), that an accused enemy war criminal may come into the American Courts and challenge the fundamental constitution of the tribunal which tried him and the validity of the charge. Yamashita and Quirin got into court without question because they were in prison on American soil. The posture of this case is different only in that the present confinement is in American-occupied Germany. It is upon this difference, and this difference alone, that the Government relies for its contention that there is no jurisdiction here to issue the writ. For there is no question but that if the Army had chosen to incarcerate these respondents in a penitentiary within the United States instead of in Landsberg Prison in Bavaria, *Yamashita* and *Quirin* would have stood as unassailable authority, not only for the jurisdiction of the federal judiciary, but also for the prisoners' substantive right to have declared void a convic-

tion based upon an improper charge or an improperly constituted tribunal.

The Government says that because these prisoners are now confined in Germany they have no right, under American law, to be freed even if improperly convicted. Since they have no substantive rights whatsoever, the Government asks, how can they possibly be confined illegally? How can anything that the American military authorities do with them or to them be illegal? And how can there possibly be any jurisdiction in the federal judiciary to issue a writ of habeas corpus to vindicate their nonexistent rights? This is not to say, the Government makes haste to interject, that American officials abroad have carte blanche to violate American law in dealing with enemy aliens. "It is our position that non-resident alien enemies have no rights under American law, even though American officials must act under and in accordance with that law" (Government's Brief, p. 67).

We must confess that we find this line of reasoning most puzzling. We are confronted with the picture of two enemy aliens, both convicted of war crimes, possibly by the same tribunal. One is imprisoned in an American territory, the other in an American prison in Germany. The first, this Court has already held, would have fundamental rights with respect to trial and conviction; the second, the Government would have us believe, because of the place of his imprisonment, has no such rights. Even if the Military Commission which convicted him did not "act under and in accordance with American law", as it was duty bound to do, there is nothing that he can do about it because he has "no rights under American law". But, if some day—possibly upon the consummation of a German peace treaty—he should be transferred to an American prison, he would then presumably for the first time become possessed of substantive rights with respect to his original conviction which would date back to the time of such conviction and render it illegal nunc pro tunc.

The difficulty of the Government's position is that if is trying to turn back the clock on *Yamashita* and *Quirin*. In *Yamashita*, as here, the Government vigorously urged that the prisoner had no substantive rights worthy of the protection of the Court. If questioned the right of an enemy alien to come into court, and questioned whether once in, he was possessed of any rights capable of being vindicated. The fundamental power of this Court to pass on any phase of a war crimes case was also put into issue, it being contended that the issues involved related to "foreign policy" or to the "war power" and were peculiarly exempt from the scrutiny of this Court.

All of these propositions this Court summarily rejected. The Court held instead that even a defeated enemy must be dealt with in accordance with law. This rule, we maintain, must apply regardless of the geographical locality in which the defeated enemy is confined after conviction.

In arguing as to the prisoners' substantive rights, the Government appears to be doing what it was told not to do in *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U. S. 129, 142, namely arguing the merits of the case when preliminary issues have not been decided. For, certainly the question of jurisdiction of the District Court must be disposed of before the questions as to the validity of the confinement under the Constitution and under the various pertinent statutes and treaties can arise. To say, as the Government does, that there is no tribunal which has jurisdiction because the prisoners have no rights and that the prisoners have no rights because there is no tribunal with the jurisdiction to enforce them is, indeed, burning the candle from both ends.

The Government, by its argument premising lack of jurisdiction upon lack of substantive rights, asks this Court to disregard one of its fundamental tenets: that constitutional questions should not be decided unless absolutely necessary. *Reserve Army* v. *Municipal Court*, 331 U. S. 549; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *United Public Works* v. *Mitchell*, 330 U. S. 75;

Alma Motor Co. v. *Timken-Detroit Axle Co., supra;* Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. The Court of Appeals paid heed to this wise rule of judicial administration in its opinion in this case, saying (R. 58):

> "Whether given circumstances place a given action outside an apparent constitutional prohibition and so within constitutional power, is a different question, to be established by proof and not to be considered unless raised and supported. This is a matter of judicial jurisdiction."

There will be ample time to consider which, if any, of the various provisions of the Constitution, statutes and treaties invoked by us herein are applicable to enemy aliens confined abroad, after this Court has held that there exists a tribunal with the jurisdiction to give such consideration.

Without pausing at this time to argue our case on the merits, we might observe that the Government would find it most difficult to argue that the Geneva Convention for the Treatment of Prisoners of War—which we claim to have been violated here—was not intended by the Senate which ratified it to apply to enemies taken prisoner abroad. We think it equally clear that the treaties, decisions and principles which make up the "laws of war" which the Constitution in Article I, Sec. 8, Clause 10, expressly authorized Congress to deal with and which this Court has recognized as a part of the body of American law (*Ex Parte Quirin, supra*) must also, by their very nature, have application wherever our Army finds itself—at home or abroad. Indeed, unless this body of law has application to our army abroad, there remains no basis upon which American commanders in the field even have the basic authority to convene war crimes tribunals in the first instance. And, whatever may be the ultimate view which this Court may take as to the applicability of the Due Process Clause to action of the military abroad, we would suppose that it would be taken on the basis of full consideration of the merits and not upon a preliminary determination of jurisdiction.

(3)

Whether statutes and treaties, such as the Geneva Convention, apply to our officials outside our borders is merely a matter of the intent of the draftsmen; for it is obvious that regulation of the conduct of United States officials outside our borders may be appropriate to effectuate, and thus would be within a number of the powers granted by the Constitution to Congress and the Executive.[5] But more important, as the Court of Appeals pointed out, the Constitution determines the validity of acts of United States officials no matter where they take place; "constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory" (R. 58). The fact that officials of the United States act outside thereof obviously cannot release them from the terms of their agency to act for the people of the United States which are set forth in the Constitution, or in treaties or statutes, the validity of which is in turn referable to the basic document.[6] As established in the controversy that arose during the extension of the United States' power at the beginning of the 20th Century:

> "Every function of the Government being * * * derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable * * * in every instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but

[5] See *Cook* v. *United States*, 288 U. S. 102, construing the Tariff Act and a treaty with Great Britain, both of which included provisions affecting seizures by United States officials outside the territorial waters of the United States; *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, construing a statute as applicable outside the United States; *Foley* v. *Filardo*, 336 U. S. 281, 285; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

[6] "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. * * * " "The Federalist", No. 78.

whether the provision relied on is operative" (*Downes* v. *Bidwell*, 182 U. S. 289, 292; see *Balzac* v. *Porto Rico*, 258 U. S. 298, 305).[7]

"The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that Government is exerted"-(*Balzac* v. *Porto Rico*, at p. 312); those provisions which are basic and fundamental restrictions upon the United States government must be deemed operative even though the territory in which the officials act is not a part of the United States (*ibid.*; see also *Dorr* v. *United States*, 195 U. S. 138, 149). For obligations and duties are the accompaniment of power.[8]

The explicit language of the Constitution itself shows that it was deemed to be an instrument controlling the conduct of the United States government wherever its sovereign power was exerted rather than merely within the United States. Some provisions restrict the United States in any exercise of its "jurisdiction", rather than throughout its territory, with the clear intention of covering exercises of power outside United States territory.[9] And this Court held in a decision which has been repeatedly cited and has never been doubted or deprecated, that the restrictions imposed upon United States officials by the Constitution apply to them outside the United States:

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[7] The dissent from this view was on the basis that *all* Constitutional provisions should everywhere be deemed applicable, rather than that our officials could anywhere be deemed altogether free from Constitutional restrictions. See discussion in *Balzac* v. *Porto Rico*, 258 U. S. 298.

[8] *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 314.

[9] Thus, the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". That "place subject to their jurisdiction" refers to places outside the United States is apparent from the phraseology of the Amendment; and that "jurisdiction" is used in the sense of power is also clear from its usage in other parts of the Constitution (see Article III, Secs. 2 and 3; Article IV, Sec. 2; Eighteenth Amendment).

specifically, that the powers of the Commander-in-Chief are restricted by the Fifth Amendment though he acts in foreign territory (*Mitchell* v. *Harmony*, 13 How. 115; see also *United States* v. *Russell*, 13 Wall. 623, 628).

Even assuming, however, that the trial and conviction of the prisoners was not controlled by any of the prohibitory provisions of the Constitution, their detention is, assuming the truth of their allegations, in violation of the Constitution. For unless the detention is in conformity to a valid delegation of power from the Congress and the President as Commander-in-Chief, or at the least, from the Commander-in-Chief acting alone, the force of the United States is being exerted outside the scope of constitutionally granted powers. Insofar as Congressional delegation is concerned, it is clear under the *Quirin* and *Yamashita* decisions that the only authority granted by Congress to military tribunals was to hold trials for violations of the law of war; the delegation from the Commander-in-Chief was in the instant case similarly circumscribed.[10] Assuming a valid delegation from the Commander-in-Chief to the Joint Chiefs of Staff, the terms of their delegation to General Wedemeyer were for him "to appoint a United States Military Commission in China for the trial of violation of the laws and customs of war" (R. 49).[11] No other power

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[10] Compare *Mechanics' Bank and Traders' Bank* v. *Union Bank*, 22 Wall. 276, 297, where this Court assumed that the President as Commander-in-Chief had the power to establish a civil court in occupied territory but recognized that the validity of its establishment depended upon whether the officer who performed the act had had such power delegated to him.

[11] The full statement of the Tribunal's jurisdiction was "Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war and German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of German surrender terms" (R. 49). That this authorization was intended to permit trial for violation of the German surrender terms only *insofar* as such violation might constitute a violation of the laws of war is apparent from the fact

of punishment was delegated. Thus, whether or not the detention was within the delegation and thus was constitutional depends, even assuming the broadest powers of the Commander-in-Chief, on whether the offense for which respondents were tried was a violation of the laws of war; as in *Yamashita*, the "military orders only authorized trial if the charge was for a violation of the laws of war" (327 U. S. at p. 13).

Whatever argument might be made as to the inapplicability of Constitutional prohibitions outside the United States, or to enemy aliens outside the United States, it seems incontrovertible that the Constitutional assignment of powers is controlling wherever and whenever United States officials act. See *Knauff* v. *Shaughnessy*, 338 U. S. 537, where this Court recently reviewed the constitutionality of a Congressional delegation to the President, on the petition for habeas corpus of a non-resident enemy alien who was technically outside the borders of the United States.[12]

Thus, respondents' detention is unconstitutional because it has not been effected under the powers delegated by the Constitution either to the President or to Congress, if, as their petition alleges, the acts for which they were tried and punished did not constitute a violation of the laws of war. In view of this Constitutional issue, the purpose of the habeas corpus statute dictates that it be interpreted to grant jurisdiction to consider respondent's petition.

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that this phrase was deliberately introduced into the authorization though it did not appear in the request (R. 47); that the two phrases defining the tribunal's jurisdiction are to be read as qualifying each other rather than in the conjunctive is also apparent from the circumstance that the entire authorization was only to cover trials of persons violating the surrender terms (see request for authorization, R. 47). That the authorization was understood to be limited to trials for violation of the laws of war is clear from the charge (R. 25-26).

[12] Compare *Prize Cases*, 2 Black. 365, as to review of the scope of the power of the Commander-in-Chief though the act in question was effected outside the United States.

(4)

The Court below emphasized its conviction that the question presented herein could not be answered by "casual references to statutes or cases" since it "stems directly from fundamentals" (R. 55). The most fundamental of the "fundamentals" enunciated by the Court was this: that "in our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power" (R. 56).

We should not think that this restatement of the constitutional role of the judiciary would be open to serious debate at this stage of our nation's history. And yet the Government denies it: It "is certainly far from a universal proposition, admitting of no exceptions" (Government's Brief, p. 61). Particularly in the realm of foreign affairs and the conduct of wars, it urges, the Executive may be immune from judicial inquiry. Under such circumstances, it says, the prisoners—aggrieved victims of illegal executive action—can seek redress only through executive channels.

It is hardly necessary for us to say that this Court has never held that unconstitutional action of the Executive in the field of foreign affairs is beyond the power of the Court to remedy. If it has held that foreign affairs are placed by the Constitution primarily within the Executive and Legislative domain so that those arms of the Government have therein a wide range of constitutional discretion (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304) that is a far cry indeed, from holding that they have carte blanche to act illegally and unconstitutionally within that area. And, needless to say, this Court has not hesitated to make it clear that even treaties with foreign governments—the classic form of action in the international sphere—must accord with the mandates of the Constitution, and are subject to judicial scrutiny in the event of question (*Missouri* v. *Holland*, 252 U. S. 416).

It scarcely contributes to clarity to say that even if these prisoners are possessed of rights which have been and are being violated, they nevertheless remain without remedy. Whatever the form of words employed, the issue remains the same. Can the Executive restrain individual liberties in violation of the Constitution, laws, and treaties of the United States and not be answerable therefor to the Judiciary?

(5)

This Court has already indicated its awareness of the fact that the question at issue is not limited to alien enemies or even to aliens. If the Government reads *Ahrens* correctly and the jurisdiction of the federal judiciary does not extend to cases of confinement abroad, not merely aliens but also American citizens will find themselves without recourse against illegal detention by the American military. As Mr. Justice Douglas stated in his concurring opinion in *Hirota* v. *MacArthur*, 338 U. S. 197:

> "Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or Commission. If no United States court can inquire into the lawfulness of his detention, the Military have acquired, contrary to our traditions * * * a new and alarming hold upon us."

Mr. Justice Douglas went on to detail, in a footnote, the growing significance of the problem:

> "Cases of this sort are beginning to appear. Re Bush, 336 U. S. 971 is such a case. Petitioner was a civilian employee of the War Department from Feb. 19, 1946 to Dec. 28, 1947 and was stationed in Japan for most of that period. He terminated his employment and returned to this country. Thereafter, he was en route to Siam when his plane landed in Japan. He was arrested and tried by a General Provost Court, sitting in Japan for trading American goods to a Japanese for certain emoluments. He was convicted

and sentenced to one year imprisonment and fined 75,000 yen. On May 9, 1949, we denied his motion for leave to file a petition for habeas corpus 'without prejudice to the right to apply to any appropriate court that may have jurisdiction.'

"For a somewhat comparable case from Germany see Bird v. Johnson, 336 U. S. 950 where we denied motions for leave to file petitions for writs of habeas corpus on April 18, 1949."

See also:

Fairman, *Some New Problems of the Constitution Following the Flag* (1949), 1 Stanford L. Rev. 587.

Mr. Justice Rutledge, in his dissenting opinion in *Ahrens*, joined by Mr. Justice Black and Mr. Justice Murphy, also expressed concern lest the decision have the effect of precluding habeas corpus at the behest of citizens, both civilians and members of the armed forces, who had either been detained pursuant to sentence imposed for alleged offenses or confined "for indefinite periods without charge and without trial." Similarly, the commentators have been practically unanimous in urging that Americans abroad not be deprived of their right to habeas corpus—a denial which logically must follow if jurisdiction is lacking in this case. See Fairman, Some New Problems of the Constitution Following the Flag (1949), 1 Stanford L. Rev. 587; Wolfson, Americans Abroad and Habeas Corpus (1948), 9 Fed. B. J. 142; Wolfson, Americans Abroad and Habeas Corpus: The Trap Begins to Close (1949), 10 Fed. B. J. 69; Requirement of Local Detention for Federal Habeas Corpus Jurisdiction (1949) 16 U. Ch. L. Rev. 335; Habeas Corpus in Federal District Courts—Jurisdiction Over Parties (1948) 3 Miami L. Q. 52; Jurisdictional Questions in Federal Habeas Corpus Cases (1949) 29 B. U. L. Rev. 238.

These grave implications cannot be lightly waved aside upon the assumption that a decision as to alien enemies will not determine the case as to citizens. If the statutory

jurisdiction of the federal judiciary ends when the prisoner is over our borders and if there is not additional jurisdiction by virtue of the Constitution, on what basis will the Federal District Courts be able to act—either as to alien or citizen? Certainly there is nothing in the statute or in the Constitution which distinguishes between aliens in confinement and citizens in confinement. Nor has this Court ever drawn any such distinction. This Court has at least three times already held that enemy aliens held within American territory for alleged war crimes are entitled to the writ of habeas corpus (*Ex parte Quirin, supra: In re Yamashita, supra; Ludecke* v. *Watkins*, 335 U. S. 160). And, of course anyone, citizen or alien, brought forcibly to this country from abroad may seek the writ (*In re Territo*, 156 F. (2d) 142 (9th Cir.)).

We see no escape from the conclusion that if aliens confined by the United States abroad do not have a right to the writ, citizens confined abroad do not have it either. The Government believes that a distinction is possible—apparently upon the basis of the English history—but it does not attempt to explain how such a distinction could be made to square with its purely *geographic* view of the *Ahrens* case. As we have indicated in some detail under Point I, we do not think that the English cases—for whatever they are worth—are opposed to our position. They have certainly drawn no distinction based upon the citizenship or alienage of the prisoner.

Having made this faint attempt to show how an exception could be carved out for American citizens, if the Court should be so disposed, the Government goes on to urge that, actually there is no difference between citizens and aliens on this point—that neither has a right to the writ. This conclusion the Government views with equanimity. Indeed, seems to imply the Government, since "the Constitution can have no operation in another country," American citizens abroad, like aliens, can lay claim to no substantive rights of any kind whatever.

There is nothing in the history of the making of the Constitution to tell us what the Framers would have thought of these propositions. In 1789 American power was somewhat less than global. The Framers could not have anticipated that some day the rule of the United States Government would extend throughout the world. Much less could they have anticipated the forms in which that rule would be cast: as sole or joint military occupant, as lessee of military bases, as protector, or as the holder of some other kind of power over territories and populations short of total sovereignty. What they could and did anticipate was that there would be occasions of abuse of power by the Executive against which only the great prerogative writ of the English common law could afford protection. This writ they cherished highly—so highly that they forbade Congress, except in time of national emergency, to tamper with it. If exceptions are now for the first time to be carved into it, if citizens or aliens or both are to languish in illegal confinement without hope or remedy simply because they are in a penitentiary across the seas, the writ of habeas corpus can never again be the "Freedom Writ" in the full and unconditional sense envisioned by the Framers.

(6)

We have said that under the Government's view the availability of the writ would rest upon the whim of the jailer. The proposition we think is self-evident. If the place of confinement governs, the Executive, which selects the place of confinement, has an obvious power to decide whether the writ shall or shall not lie. Similarly, we may remark, Congress which is expressly forbidden to suspend the writ, could accomplish precisely that result by decreeing that certain types of offenders, alien or citizen, be confined in penitentiaries outside the territorial boundaries of the various District Courts. Whether this rule would extend so far as to cover American citizens convicted of

federal offenses in United States District Courts would depend upon how far this Court chose to broaden the rule enunciated in *Ex Parte Endo*, 323 U. S. 283 (1944). In the *Endo* case, the prisoner was within one District when the petition was filed and was removed to another District during the pendency of the proceedings. The Court expressly reserved the question whether the writ would have issued if the prisoner had been removed from the District before bringing his petition. Under the strictly territorial conception which the Government has advanced herein, it would seem that any person, citizen or alien, could be irrevocably stripped of his right to the writ by transportation across the American border before he has a chance to institute a proceeding.

If it be felt that we are conjuring up remote and terrible fancies, let it be remembered simply that a great constitutional safeguard, no less than a statute, is capable of being eroded away by the grinding action of "judicial activism". That is why, as this Court has been so quick to recognize, unpopular causes—as this case might perhaps be regarded—present a very special challenge to the integrity of the constitutional process. How far is it from the rule that enemy aliens have no rights, to the rule that friendly aliens—or soldiers serving abroad—or citizens in confinement abroad—or other classes or categories of human beings—likewise have no rights?

But we do not have to go beyond the record in this case to see its unfortunate implications. The Government tells us candidly what the Army's policy is with respect to American citizens convicted in Occupied Europe (Government's Brief, p. 75, fn. 57):

> "Women citizens convicted by the military government courts (now the courts of the High Commission) are returned to the United States immediately after final conviction, regardless of the length of sentence; male citizens convicted by those courts are returned, after final conviction, if their sentences exceed six months."

"Habeas corpus", the Government notes, "is available to such prisoners on arrival here." Here, truly, is habeas corpus by Executive indulgence—with the feminine gender getting a narrow but rather neat edge in the matter of the historic writ. While we suspect that the Occupation authorities are motivated at least as much by housing problems as by considerations of gallantry, the lesson pointed by this bit of administrative practice is none the less sharp. If this Court upholds the Government, it establishes also that access to the writ may be granted or withheld at will by the Occupation authorities, and thus effectively suspends the writ in contravention of the Constitution.

III

The fact that the upholding of jurisdiction will place a burden of adjudication upon the District Court for the District of Columbia cannot afford a basis for denying such jurisdiction.

(1)

It is suggested that if the Court upholds the jurisdiction of the federal judiciary, the District of Columbia will be flooded with a vast number of petitions. The burden will be so extraordinary, says the Government, that it cannot possibly be believed that Congress, in drafting the statute, intended it to be borne. We cannot believe that the Government seriously intends to put forth the statistics of 1950 as having entered into the calculations of the Congress of 1867 which first drafted the habeas corpus statute in its present form. If we thought so we should be quick to counter with statistics showing that the number of cases of confinement abroad on or about 1867 were so very few that no question of heavily burdening the federal judiciary could even have remotely arisen in anyone's mind at that time.

We assume that, while the Government has couched its argument in terms of the legislative intent of Congress, it

is really addressing itself to a supposed policy-making—or "legislative" power—of this Court.

Even if the Government were absolutely sound in its estimate of the volume of litigation involved, it would hardly afford a basis for denial of jurisdiction. We know of no case where the Court has allowed an administrative consideration of this kind to enter into the determination of a jurisdictional question. In *Holiday* v. *Johnson*, 313 U. S. 342, the Court swept aside such considerations and invalidated the delegation of fact-finding to commissioners. Nor was the Government successful in *Price* v. *Johnston*, 334 U. S. 266, in urging that for "practical" or "administrative" reasons, the Court should refuse to entertain successive applications.

We do not think that the Government's "practical" suggestion is a worthy one particularly as applied to cases which involve either capital punishment or long prison sentences. The scope of judicial review under the writ of habeas corpus is, at best, a very limited one, going as it does only to jurisdictional questions. If the Army has been diligent to act in accordance with law—as we must assume it has—there should not be so many occasions when petitions from abroad will disclose merit upon their face. To suggest, as the Government virtually has, that persons who have been illegally condemned to death or imprisonment should fulfill their illegal sentences rather than that the District Court should be burdened, is, we feel, most inappropriate.

In any event the burden of litigation that will necessarily arise if the Court upholds our contention herein will be far less than the Government intimates. The 400,000 cases tried before Military Government Courts as an incident of the Occupation are entirely different in nature from the instant case tried before a military commission as an incident of command in the field. While the Court has described in *Yamashita* and *Quirin* the minimal requirements of American law as to war crimes prosecutions, it has made no such

finding as to military government prosecutions. *Neely* v. *Henkel*, 180 U. S. 109, would suggest that violations of occupation edicts might be treated as violations of foreign law and so dissimilar to violations of the laws of war which have been held to be part of the body of American law (*Ex Parte Quirin*, *supra*). If this should be the holding, there would appear to be little or no basis upon which persons convicted by military government tribunals could seek redress in the American courts. As a practical matter, moreover, the overwhelming preponderance of the military government cases was disposed of in Allied Courts and, so, apparently, is completely outside the orbit of the Federal judiciary (*Hirota* v. *MacArthur*, 338 U. S. 197).

We are left, therefore, with two main classes of cases: (1) war crimes prosecutions before purely American military commissions; and (2) prosecutions of American civilian and military personnel before purely American courts-martial. We feel confident in asserting that the numbers of these cases which would give rise to petitions for writs of habeas corpus can scarcely be large enough to cause concern on the administrative level. Certainly, the Court of Appeals, which has primary concern with the administration of justice within the District of Columbia Circuit—and which has evinced a keen sense of its responsibility with respect to the habeas corpus docket of the District Court (*Dorsey* v. *Gill*, 148 F. (2d) 857)—did not consider the administrative factor important enough to defeat jurisdiction.

(2)

If, however, there be an administrative problem, the short answer is that there can be legislative correction. Certainly, any undue burden on the District Court for the District of Columbia could be alleviated by a distribution of the petitions throughout the Circuits. Statutes of this type have already been suggested. See, *e.g.*, Wolfson, Americans Abroad and Habeas Corpus (1948), 9 Fed. B. J. 142; G. I's Overseas and Habeas Corpus. (1949),

1 Stanford L. Rev. 555, 559. This does not mean that it is desirable or, for that matter, constitutional for Congress to make a comprehensive disposition of all of the questions of jurisdiction which may arise. As Professor Fairman has stated (1 Stanford L. Rev., at 643):

> "It is believed desirable that the problem be handled without legislation. A statute conferring jurisdiction to hear applications from particular categories of petitioners might seem to imply that the writ was not available to others. To what categories should the writ be available? To citizens (regardless of the type of tribunal by which they were tried), but not to aliens? To persons held under our power as an occupant? These are questions better answered by the judiciary, after argument, than by legislation."

IV

The petitioners, as superiors in the direct line of command over the commandant of the prison, with admitted power to effectuate the release of the prisoners, are proper parties to whom the writ may be addressed.

If power to issue the writ on behalf of persons outside the territorial jurisdiction of the District Court exists, it is unnecessary to debate the issue as to the proper respondent. Named as respondents in this proceeding were the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, and the members of the Joint Chiefs of Staff, as officials resident in the District of Columbia who "have jurisdiction and supervision over the official acts of the Commandant of Landsberg Prison" (R. 12). In its petition for certiorari the United States admits that "these officials have power to effectuate a mandate which the district court might issue for the release of the prisoners. * * *" The case thus takes on the posture of *Ex parte Endo*, 323 U. S. 283, 304-305 (1944), where the Court was advised that the writ would be obeyed.

even though no respondent was ever served or had appeared. See also *Ex parte Yarbrough*, 110 U. S. 651, where the Superintendent of Albany penitentiary rather than the United States Marshal, for the Northern District of Georgia, made a return to the show cause order.

In view of the Government concession that the named officials have power to effectuate any order of the Court, arguing that because they are not the immediate jailers of the prisoners they are not proper respondents is merely a quibble. See Vaughn Williams, L. J., in *Rex* v. *Earl of Crewe* (1910), 2 K. B. 576, 26 T. L. R. 439. In view also of this concession, it is similarly a quibble to say that there has been no express waiver of the issue.

In any case the respondents named were proper. In *Wales* v. *Whitney*, 114 U. S. 564, the order of the Secretary of the Navy, placing Wales under arrest, did not, it was held, confine Wales so as to allow him the writ of habeas corpus, since he was free to come and go. But there was no question that had the Secretary of Navy ordered Wales actually incarcerated, the writ would have run against him absent, of course, an immediate jailer. Indeed, the Court implies that in such a case the writ would properly have been directed against the Secretary.

> "It is said in argument that such is the power exercised over the appellant by the Secretary of Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disregard this order, he had nothing to do but take the next or subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or proper officer could have been sent to arrest and bring him back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty quite different from the first."

The rule applied in the past in the federal courts has been that the writ must run against some person within

the jurisdiction of the Court, since of course, it is against him that the writ must be effective. *Ex parte Endo*, 323 U. S. 283. Thus, a prisoner, where a jailer is present in the judicial district, cannot seek habeas corpus as against his superior outside the district. *Jones* v. *Biddle*, 131 F. 2d 853 (9th Cir.); *Sanders* v. *Bennett*, 148 F. 2d 19 (App. D. C.) Cf. *Burns* v. *Welch*, 159 F. 2d 29 (App. D. C.).[13] Conversely, it would seem that when the immediate jailer is not within the district, the writ must run against his superior. The only requirement of the statute is that "The writ or order to show cause shall be directed to the person having custody of the person detained."

Indeed, there are innumerable cases where the proper respondent is a superior of the immediate jailer even when the jailer is himself within the district. The Commanding Officer of an Induction Center, *United States ex rel. Alfieri* v. *Flint*, 54 F. Supp. 889 (D. Conn.), aff'd 142 F. 62 (2d Cir.); see *United States ex rel. Goodman* v. *Roberts*, 152 F. 2d 841 (2d Cir.), has been held a proper respondent, and the Supreme Court itself has entertained cases where the respondent (and petitioner for certiorari) was a Major General. *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304; *Eagles* v. *United States ex rel. Horowitz*, 329 U. S. 317. Sometimes, indeed, the real party in interest in a habeas corpus proceeding will not even be a superior of the jailer. A foreign government and its consul are the real parties in interest in a habeas corpus proceeding brought to avoid extradition, *Ornelas* v. *Ruiz*, 161 U. S. 502; *Clough* v. *Strakoach*, 109 F. 2d 330 (9th Cir.). To set aside a warrant of deportation not the warden of the penitentiary in which a prisoner is confined, but the Commissioner of Immigration is the proper party on habeas corpus proceedings. *Seechi* v. *United States Commissioner of Immigration*, 62 F. Supp. 594 (D. Penn.).

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[13] The two cases last cited were subsequently overruled in so far as they were in conflict with *Ahrens* v. *Clark*, 335 U. S. 188. See *McAffee* v. *Clemmer*, 171 F. 2d 131 (App. D. C.).

Thus it cannot be said that the rule is invariably that the writ of habeas corpus must be directed against the immediate jailer. As in all other phases of habeas corpus the courts have allowed elasticity so that substantial justice may be done. Cf. *Secretary of State for Home Affairs* v. *O'Brien* (1923), A. D. 603 (Home Secretary held to have de facto control of person illegally handed over to Irish Free State authorities). In the case of persons abroad, writs of habeas corpus can only be brought against those who in this country exercise control over the jailers. To deny them leave to direct the writs against such persons would be to reverse the entire history of the writ of habeas corpus by denying it upon a trifling technicality.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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April, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, Secretary of Defense of the United States, *et al.*,

Petitioners,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as Next Friend of FRANZ SIEBERT, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AN *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AN *AMICUS CURIAE*

The American Civil Liberties Union respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled action, and submits that it satisfies the requirements respecting eligibility for such leave provided in amended paragraph 9 of Rule 27 of this Court's Rules, on the following grounds:

1. Respondents have consented to the applicant's filing of a brief *amicus*. The Solicitor General, however, on behalf of petitioners has refused consent, stating that because of the amendment to this Court's Rule respecting *amicus* briefs, he deems it desirable generally to leave to

this Court the determination of whether or not to accept briefs *amicus*, but stating that he will not oppose the instant application for permission to file.

2. The question presented by the above entitled action is whether the courts of the United States have jurisdiction to issue a writ of habeas corpus on the petition of alien enemies convicted by a United States military tribunal for violation of the laws of war but confined outside the territorial limits of the United States, in a prison operated by the United States Army in the American zone of occupation of Germany.

3. Interest of American Civil Liberties Union

(a) The American Civil Liberties Union is a nonpartisan nationwide organization maintained for the purpose of furthering and effectuating the Constitutional guarantees as to personal and political liberties; one of its major and traditional methods for advancing this objective is participation as an *amicus curiae* in litigation involving civil liberties issues.

(b) The American Civil Liberties Union's program emphasizes the advancement of American efforts to stimulate democratic practices on the part of other governments, and in particular, in the countries defeated in World War II in which the United States exercises temporary sovereignty as an occupant: the Union has concerned itself with this aspect of international policy because of American responsibility to the peoples of other nations attendant on the United States' position of leadership, as well as because of the repercussions of the forms of government in other countries upon those here. Democratic conduct of United States officials with respect to personal free-

dom and the administration of justice is, in the view of the American Civil Liberties Union, of special importance in dealing with the people of the occupied areas, in view of the special obligation to such people arising from our assumption of occupancy. The Union holds that the conduct of United States officials in relation to such people must accord with democratic principles in order to help establish democratic patterns in such countries, to exemplify the operation of democratic processes, and to demonstrate the sincerity of United States' declarations of the worth of democratic institutions.

In recent years the American Civil Liberties Union has devoted a major part of its activities to the promotion of these views, having maintained since 1948 a Committee on the Occupied Territories, and since 1945 a Committee on International Civil Liberties.

(c) The American Civil Liberties Union has a keen interest in the instant case because (1) of its concern with the general availability of habeas corpus as a means of protecting personal liberty; (2) if jurisdiction to issue the writ is not asserted in the face of allegations of a substantial nature in respondents' petition that their detention violates the Constitution and laws of the United States, the result will be a judicial failure to implement and effectuate Constitutional and statutory safeguards; (3) if jurisdiction to issue the writ is denied on the basis that the Constitution and laws of the United States do not apply with respect to respondents' detention, the result will permit of arbitrary denial of personal freedom by United States officials outside the United States; (4) a failure to establish jurisdiction to issue the writ will result in irreviewable military discretion and, *pro tanto*, the supremacy of military over civil power in dealing with individual liberty; (5) if the writ is held to be unavailable to re-

spondents, the United States will be withholding from people over whom it exercises power outside its borders, the protection it enforces within. Thus the case has unusual significance from the standpoint of exemplifying democratic practice to the peoples of other countries, particularly of occupied areas, and of establishing the means for correcting arbitrary deprivations of personal freedom by United States officials outside our borders; further, the decision herein is important as a matter of principle and precedent from the standpoint of the effectuation of civil liberties in the United States. Thus, the instant case has an important bearing on the objectives and program of the movant.

4. Reasons for submission of brief

Petitioners' brief has not yet been filed, and respondents' brief consequently is not yet in final form. Movant's counsel has, however, spent a substantial amount of time, approximately sixty hours, in studying all available documents in the instant case as well as relevant authorities. On the basis of such study, and of conversations between its and respondents' counsel, the movant has reason to believe that some questions of law of relevance to the issues herein will not be fully covered in respondents' brief.

Movant believes that in addition to precedents and history as to habeas corpus jurisdiction which respondents intend to argue, the following broader questions, which respondents' counsel has stated he does not presently intend to brief extensively, if at all, are relevant: the operation of the Constitution outside the borders of the United States; the correlation between the existence of a Constitutional restriction and the availability of a remedy to insure its application; Constitutional restrictions on the power of the President as Commander-in-

Chief; and the powers of the United States as an occupant. These questions, while broad, have direct and important bearing on the issue presented by the instant case. The opinion of the Court of Appeals herein is largely based on its view of the first two questions mentioned; and this Court has indicated in its opinion in *Ahrens* v. *Clark*, 335 U. S. 192, that policy considerations and the effect of various possible interpretations of the statute providing for habeas corpus jurisdiction are of the utmost significance in determining its construction.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining respondents' proposed argument.

It is respectfully requested on the above grounds that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION.

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March 16, 1950.